# ACCESS AND IMPACT:
# AN EVALUATION OF THE INTERVENOR FUNDING PROJECT ACT, 1988

A Report to the Ontario Ministries of the
Attorney General, Energy and Environment

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# HIGHLIGHTS: ACCESS AND IMPACT

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## The Study and Methodology

- A four month, $70,000 study examined a 3 year pilot project under the Intervenor Funding Project Act, 1988 (IFPA).

- The project funds interventions before the Environmental Assessment Board (EAB), joint boards, and the Ontario Energy Board (OEB); the files for relevant cases were systematically searched.

- 71 intervenors in 22 cases (up to 15 Dec 1991) were awarded approximately $25 million.

- Approximately $23 million was awarded in one hearing - the Ontario Hydro: Demand Supply Plan before the Environmental Assessment Board; the remaining approximately $1.5 million was awarded in 21 cases to 37 intervenors with an average of about $50,000 in other cases heard before the Environmental Assessment Board, joint boards, and the Ontario Energy Board.

- Over 90 submissions were received and analyzed by the study; the boards' decisions and related documents were carefully reviewed; and a study was undertaken of related initiatives in other jurisdictions.

## Summary of Recommendations

1. IFPA should be made permanent, with a review after three years.

2. Intervenor funding should not be aligned with the criteria for awarding costs. Need and public interest issues should continue to be the focus of intervenor funding.

3. Intervenor funding should be paid for by the proponent.

4. IFPA subsection 8(3) permitting a panel to refuse to make an award or reduce it because of "significant financial hardship" to the funding proponent should be retained.

5. Consultation should be carried out and decisions made regarding expansion of IFPA to the Ontario Municipal Board and the Environmental Appeal Board within the next three year review period.

6. An independent funding agency should be established - so long as the costs of such an agency are acceptable.

7. The Chair of the funding agency should have authority to appoint as many members of a funding panel as are necessary.

8. The IFPA should be amended to provide that an oral hearing is not mandatory for every funding decision and to provide that the Statutory Powers Procedure Act does not apply.

9. The definition of proponent should be expanded to permit the naming of a funding proponent in a generic hearing called on the initiative of the Ontario Energy Board.

10. IFPA should be amended to apply, where relevant, to pre-hearing phases of a process. There should be monitoring of this provision to determine whether its goals of scoping and early resolution of issues are met.

11. IFPA should be amended to clarify the ability of the hearing panel to determine the relevant issues and matters of jurisdiction and hearing format prior to the complete determination of funding applications.

12. IFPA should be amended to allow the funding panel to determine entitlement to funding and to make awards to intervenors to participate in the initial scoping and issue identification phase of the hearing.

13. The criteria for funding in ss. 7(1) and 7(2) of IFPA should be retained, with some modifications.

14. Need should continue to be an important criterion for funding.

15. IFPA should be amended to provide that all of the criteria should be considered, but that not all of the criteria need be met in every case.

16. IFPA should be amended to provide that the criteria of ascertainable interest (s.7(2)(a)) and separate and adequate representation (s.7(2)(b)) be determined with reference to the different perspectives of the intervenors.

17. Section 7(2)(f) should be amended to provide that where coordination appears to be possible, the intervenors have the burden of showing, with due attention to their perspectives, why coordination should not be required.

18. IFPA should be amended to require proponents to disclose their costs of the proceedings and of the undertaking.

19. The limit on lawyers' fees to the Legal Aid rate should be retained.

20. IFPA s.7(5) - dealing with eligible disbursements - should be replaced with a provision giving funding panels the power to determine which disbursements will be eligible in each case on the basis of "relevance" and "reasonableness."

21. Funded intervenors should be able to shift funds within funding categories but should not be able to shift funds from one category to another without approval of the funding panel.

22. Section 12 - dealing with supplementary funding - should be retained. Supplementary funding should be awarded by the independent funding agency and not by the hearing panel. Supplementary funding should be awarded where there has been an unanticipated and substantial change in a proceeding.

23. Costs should continue to be awarded by the hearing panel; Part II of IFPA should be retained.

24. Section 12(3) should be amended to make it clear that a funding award will be deducted from a costs award but that, if a costs award is less than the amount of funding actually and reasonably expended, there is no requirement of repayment of the funding award.

25. Section 9(2) - allowing the boards to require repayment where conditions of an award have not been met - should be retained.

26. The EAB should adopt the OEB's funding practice, in awarding costs, regarding their assessment. An independent funding agency, if established, should administer and monitor awards.

27. The EAB should adopt the practice of providing funding awards in lump sums to the solicitors of intervenors.

28. IFPA should be amended to prohibit the imposition of a holdback on awarded funds.

29. Section 9(1) - giving the boards access to intervenors' records to ensure conditions are met - should be retained.

30. OEB staff should continue to play an important role in hearings. An intervenor seeking funding and OEB staff should attempt to coordinate.

31. Boards should make efforts to hold hearings in local centres and at flexible times. Boards' rules should be amended to require them to consult with intervenors when establishing hearing locations and schedules.

32. A special study should be commissioned to consider the needs of aboriginal peoples in hearings to which IFPA applies.

33. Municipalities should continue to be eligible for funding if they can demonstrate need.

34. IFPA should be amended to make clear that coordination between municipalities and other intervenors should not be forced on the assumption that municipalities represent the interests of their citizens.

35. IFPA should provide that an appeal of a funding decision is available to the court on a question of law and not to any minister or the Cabinet.

36. IFPA should be amended to require an appeal to be launched within thirty days of a decision, unless no substantial prejudice would result (in the opinion of the court). Appeals should not operate as a stay of either funding or main hearing proceedings.

37. IFPA should be amended to provide for funding for appeals and judicial review applications if certain conditions are met.

38. Special rules should be developed for application, as needed, to complex and lengthy hearings involving funding decisions.

# POINTS SAILLANTS : ACCÈS ET IMPACT

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### Teneur de l'étude et méthodologie

- Il s'agit d'une étude de quatre mois, au coût total de 70 000 $, et portant sur le projet-pilote de trois ans mis en oeuvre en application de la Loi de 1988 sur le projet d'aide financière aux intervenants (la Loi).

- Ce projet-pilote assure l'aide financière pour les interventions devant la Commission des évaluations environnementales (CEE), les commissions mixtes et la Commission de l'énergie de l'Ontario (CEO); tous les dossiers en la matière ont fait l'objet d'un examen systématique.

- Quelque 25 millions de dollars ont été accordés à 71 intervenants dans 22 dossiers (à la date du 15 décembre 1991).

- Près de 23 millions de dollars ont été accordés pour une seule audience, celle de la présentation du plan de prévision de l'offre et de la demande d'Ontario Hydro devant la Commission des évaluations environnementales; le reste, soit à peu près 1,5 million de dollars, a été réparti entre 37 intervenants dans 21 dossiers, soit une moyenne de 50 000 $ pour chacun des autres dossiers instruits par la Commission des évaluations environnementales, les commissions mixtes et la Commission de l'énergie de l'Ontario.

- Plus de 90 mémoires ont été reçus et analysés dans le cadre de l'étude; les décisions des commissions et la documentation annexe ont été attentivement examinées; et une étude a été entreprise sur les initiatives du même genre dans d'autres ressorts.

### Sommaire des recommandations

1. Il faut faire de la Loi une institution permanente, avec examen des résultats au bout de trois ans.

2. Il ne faut pas appliquer à l'aide financière les critères qui régissent les frais et dépens judiciaires. Le besoin et l'intérêt public doivent demeurer les considérations premières.

3. L'aide financière doit être à la charge du proposant.

4. Il faut conserver le paragraphe 8(3) de la Loi qui habilite le comité saisi à refuser ou à réduire l'aide financière en cas de «préjudice financier grave» pour le proposant qui y est tenu.

5. Il faut procéder aux consultations en vue de décider, au cours des trois années qui viennent, s'il y a lieu d'étendre l'application de la Loi à la Commission des affaires municipales de l'Ontario et à la Commission d'appel de l'environnement.

6. Il faut créer un organisme indépendant d'aide financière aux intervenants, dans la mesure où le coût en est acceptable.

7. Il faut que le président (la présidente) de l'organisme d'aide financière aux intervenants soit habilité(e) à nommer au comité d'aide autant de membres qu'il(elle) le juge nécessaire.

8. Il faut modifier la Loi de façon prévoir qu'une audience orale n'est pas obligatoire pour toute décision d'aide financière, et que la Loi sur l'exercice des compétences légales ne s'applique pas en la matière.

9. Il faut élargir la définition de proposant de façon qu'il soit possible de nommer un proposant tenu à l'aide financière dans toute audience générique convoquée par la Commission de l'énergie de l'Ontario.

10. Il faut modifier la Loi de façon qu'elle s'applique, le cas échéant, aux phases du processus qui précèdent l'audience proprement dite. Il faut surveiller l'application de cette disposition pour vérifier si elle atteint ses objectifs, à savoir la délimitation du sujet et la résolution des problèmes dès les phases préparatoires.

11. Il faut modifier la Loi de façon à confirmer la compétence du comité chargé de l'audience pour se prononcer sur les questions pertinentes, les questions de compétence et les modalités de l'audience, avant l'instruction au fond des demandes d'aide financière.

12. Il faut modifier la Loi de façon à habiliter le comité d'aide financière à se prononcer sur l'admissibilité à cette aide et à accorder une aide financière permettant aux intervenants de participer à la phase initiale de l'audience, qui consiste à délimiter et à identifier les questions pertinentes.

13. Il faut conserver, avec quelques modifications, les critères prévus aux paragraphes 7(1) et 7(2) de la Loi pour l'octroi de l'aide financière.

14. Le besoin doit toujours constituer l'un des critères principaux de l'aide financière.

15. Il faut modifier la Loi de façon à prévoir que tous les critères doivent être pris en considération, sans qu'il soit nécessaire que toutes les conditions soient réunies dans chaque cas.

16. Il faut modifier la Loi de façon à prévoir que les critères de l'intérêt clairement établi (alinéa 7(2)a)) et de la représentation distincte et satisfaisante (alinéa 7(2)b)) seront appliqués à la lumière des points de vue différents des intervenants.

17. Il faut modifier l'alinéa 7(2)f) de façon à prévoir qu'en cas de coordination possible, il incombe aux intervenants de démontrer, compte tenu de leurs points de vue respectifs, pourquoi il faut les en dispenser.

18. Il faut modifier la Loi de façon à prévoir pour les proposants l'obligation de divulguer ce que leur coûtent l'instance devant la commission et l'entreprise qui fait l'objet de l'audience.

19. Il faut conserver la limitation des honoraires d'avocat au barème appliqué par l'Aide juridique.

20. Il faut remplacer le paragraphe 7(5), qui définit les débours remboursables, par une nouvelle disposition qui habilite le comité d'aide financière à décider, dans chaque cas d'espèce, quels débours sont remboursables en raison de leur «utilité» et de leur «caractère raisonnable».

21. Il faut que les intervenants ayant bénéficié d'une aide financière aient le droit de réaffecter les fonds reçus dans les limites des catégories admissibles, sous réserve de l'approbation du comité d'aide financière.

22. Il faut conserver l'article 12 sur l'aide financière supplémentaire, laquelle doit relever de l'organisme indépendant d'aide financière et non pas du comité chargé de l'audience. L'aide financière supplémentaire doit être accordée en cas de changement considérable imprévu dans l'instance.

23. Les dépens relèveront toujours de la compétence du comité chargé de l'audience; il faut conserver la partie II de la Loi.

24. Il faut modifier le paragraphe 12(3) de façon à prévoir expressément que le montant de l'aide financière sera déduit des dépens adjugés, mais qu'au cas où ces derniers seraient inférieurs au montant d'aide effectivement et raisonnablement dépensé, l'intervenant ne sera pas obligé de rembourser l'aide financière.

25. Il faut conserver le paragraphe 9(2), qui habilite la commission compétente à ordonner le remboursement si les conditions de l'aide financière ne sont pas respectées.

26. Il est recommandé que, dans la fixation des dépens, la CEE adopte les pratiques observées par la CEO en matière d'aide financière. Au cas où un organisme indépendant d'aide financière serait créé, il est recommandé de l'habiliter à assurer la gestion et la surveillance des fonds accordés.

27. Il est recommandé que la CEE adopte la pratique qui consiste à accorder l'aide financière sous forme de sommes forfaitaires à remettre entre les mains des avocats des intervenants.

28. Il faut modifier la Loi de façon à interdire les retenues sur l'aide financière accordée.

29. Il faut conserver le paragraphe 9(1) qui donne aux commissions accès aux dossiers des intervenants pour s'assurer que les conditions prévues sont respectées.

30. Il est recommandé que le personnel de la CEO continue à assumer un rôle important dans les audiences, et qu'il y ait dans la mesure du possible coordination entre ce personnel et l'intervenant qui demande une aide financière.

31. Les commissions doivent s'efforcer de tenir leurs audiences dans les centres locaux et selon un horaire flexible. Il faut modifier leurs règlements de façon à prévoir pour elles l'obligation de consulter les intervenants dans la fixation du lieu et de l'horaire des audiences.

32. Il faut faire effectuer une étude spéciale sur les besoins des autochtones dans les audiences soumises à l'application de la Loi.

33. Il faut que les municipalités continuent à être admissibles à l'aide financière si elles peuvent en démontrer le besoin.

34. Il faut modifier la Loi de façon à prévoir expressément que la coordination entre les municipalités intéressées et les autres intervenants ne doit pas être forcée par suite de la présomption que les premières représentent les intérêts de leurs citoyens.

35. Il faut que la Loi prévoie la possibilité d'interjeter appel d'une décision en matière d'aide financière devant un tribunal judiciaire, à titre de question de droit, et non pas devant le gouvernement ou l'un de ses ministres.

36. Il faut modifier la Loi de façon à prévoir que l'appel doit être interjeté dans les trente jours qui suivent la décision, sauf dans le cas où le retard ne causerait aucun préjudice grave (de l'avis du tribunal compétent). L'appel ne devra opérer suspension ni de l'octroi de l'aide financière ni de la tenue de l'audience principale.

37. Il faut modifier la Loi de façon à prévoir une aide financière pour les appels et les recours en contrôle judiciaire sous certaines conditions.

38. Il faut établir des règles spéciales, applicables le cas échéant aux audiences complexes qui durent longtemps et qui comportent des décisions en matière d'aide financière.

# EXECUTIVE SUMMARY: ACCESS AND IMPACT

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This report outlines the findings of an evaluation of the Ontario Intervenor Funding Project Act, 1988 ("IFPA") conducted for the Ministries of the Attorney General, Energy and Environment. IFPA established a three-year pilot project to provide funds to public interest intervenors in hearings before the Environmental Assessment Board, joint boards and the Ontario Energy Board and amended the enabling statutes of those boards with respect to their costs powers. This report gauges the effectiveness of the pilot project in achieving its objectives.

The IFPA was established to increase the opportunities for participation in administrative decision-making for those who seek to raise public interest issues and who had previously been excluded or limited in their ability to participate because of their lack of resources. Increased access is intended to contribute to the fairness of decisions and, by making more information and different perspectives available, to improve the quality of decisions with greater accountability of decision-makers and more acceptance of their decisions.

METHODOLOGY. This evaluation was conducted over a four-month period from October 1991 through January 1992. A comprehensive review of all funding applications under IFPA was conducted in order to generate a quantitative review of the Act's operations. In addition, requests for submissions from those with either experience or an interest in IFPA were made and the over ninety submissions from proponents, intervenors, lawyers, consultants, observers and the Boards themselves capture a broad range of views on the present and future of intervenor funding and IFPA in particular. A literature search was also done and efforts were made to uncover evaluations of other funding models in use in other jurisdictions. A number of interviews were also conducted.

REPORT. This report is divided into three main parts. The first part, "Background and Context of IFPA", reviews the objectives of IFPA, the events leading up to the passage of IFPA in 1988 and related initiatives now underway that could have an impact on IFPA or its scope. This part also summarizes how IFPA works and the nature of the hearings to which it applies. Finally, Part I ends with a detailed look at the Reasons for Decision of funding panels and boards awarding supplementary funding in order to provide a common understanding of the Boards' attempts to develop a coherent interpretation of the Act through IFPA's application to specific cases.

Part II of the report discusses the findings of the file search and the submissions received. First, the quantitative findings are found in a series of Tables and are discussed in the text. Second, excerpts from the submissions are set out in detail in order to make the views known to those deciding the fate of IFPA and to allow respondents access to the views of others.

Part III of the report contains conclusions about the operations of IFPA during the pilot project and recommendations for changes to the Act or related procedures. Finally, there are a number of appendices which contain copies of the letters requesting submissions, the Issues Paper, the instrument used in the file search and similar documents and the IFPA itself.

## FINDINGS

GENERAL. IFPA is a mechanism for increasing public access to administrative decision-making in the limited context of the hearings before the Environmental Assessment Board ("EAB"), Joint Boards ("JB") under the Consolidated Hearings Act and the Ontario Energy Board ("OEB"). It does this by requiring proponents to provide funds to intervenors who raise public interest issues and who fulfill a number of eligibility criteria. In this way, IFPA strikes a balance between the interests of intervenors and the interests of proponents. Although IFPA operates in this very limited context, its underlying goals could apply in a much larger context, in both administrative decision-making more broadly considered and wherever important public policy is being worked out through legal processes.

IFPA grew out of attempts to share funds with intervenors through the use of costs powers and ad hoc government funding. The precipitating event leading to IFPA was the decision of the Divisional Court in the case of Re Hamilton-Wentworth and Hamilton-Wentworth Save The Valley Committee in 1985 which prohibited a joint board from awarding costs to intervenors in advance of the hearing's conclusion. An ad hoc government funding program instituted following the Hamilton-Wentworth case was replaced by the pilot project in Part I of IFPA on April 1, 1989. Part II of IFPA gives the Environmental Assessment Board the power to award costs and expressly overrules the Hamilton Wentworth decision by not limiting the boards to the costs considerations in court proceedings. This Part is not subject to the three-year limitation.

The IFPA creates a model of intervenor funding that is unique because of its focus on need and access. In other jurisdictions, the most common method of sharing funds with intervenors in administrative hearings is through the awarding of costs payable by a proponent. In a limited number of situations, advance costs are made available for intervenors without sufficient funds to participate. Another common method of sharing funds with intervenors is through government funding to intervenors in specific hearings. Most often this is an ad hoc process, with the criteria and amounts changing from case to case. An example of transition has been a new federal funding program for environmental assessment panel reviews where the ad hoc process has been abandoned and replaced with a regularized process. Governments also make funds available to intervenors through legal aid programs, public advocates and special funds for particular kinds of cases such as class actions or Charter litigation. Finally, funds are made available to public interest intervenors through private funds such as the Canadian Environmental Defence Fund and the Women's Legal Education and Action Fund. All to some degree improve the ability of public interest intervenors to participate in decision-making processes but there are limitations in each of these models.

BOARD DECISIONS. The Boards applying IFPA over the last three years have wrestled with many difficult issues in interpreting the legislation but have approached their task with concern for both the larger goals of IFPA and the particular circumstances involved in each case. The resulting decisions provide a body of interpretation of IFPA which can be drawn on to discover some of the limits of the Act's provisions in practice.

The decisions reveal that the EAB, Joint Boards and OEB have approached the IFPA consistently on most issues, but have divergent views on certain other issues. The boards are similar in their view of the purpose of the Act, their view of the need to meet all of the criteria in most cases, their support for a reasonable contribution from intervenors where possible, their support for the concept of coordination to avoid duplication, their flexibility with respect to the requirement of an "established record of concern".

One important area of difference between the OEB and the EAB/JB is the steps that are taken by the hearing board prior to the funding panel making its decisions on funding. At the OEB, an issues day is held where the issues that will be addressed in the main hearing are determined prior to the funding hearing. At the EAB/JB, this does not occur and it is left to the funding panel to make a preliminary determination of issues likely to be relevant in the main hearing. This has caused problems for EAB funding panels in complex cases. Another area of difference is over the issue of imposing a holdback on a funding award in case the costs award at the end of the hearing is less than the amount of the funding award. The OEB takes the position that funding awards are repayable if they exceed a costs award and the EAB considers a funding award as non-repayable in the absence of bad faith, whatever the outcome of the hearing as reflected in costs awards.

There are also inconsistencies between different panels of each board with respect to certain issues. One area of inconsistency at both the EAB/JB and the OEB is the extent to which a panel will force coalition-building on reluctant intervenors.

FILE SEARCH. The review of the files in the 22 intervenor funding cases revealed important data which can be used for comparative purposes. The total amount awarded under IFPA, up to December 15, 1991, was approximately $25 million awarded to 71 intervenors. $24 million of this amount was awarded by the EAB/JB and $930,000 by the OEB. Most applicants for funding are at the EAB/JB and they have a somewhat higher success rate in being funded. This overall differential between the two boards is misleading, however, because $23 million of the $24 million awarded by the EAB/JB was awarded in one hearing, the Ontario Hydro DSP hearing under the Environmental Assessment Act. If this hearing is left out of the EAB/JB figures, there are substantial similarities between the EAB and OEB in terms of amounts awarded in total and on average (approximately $50,000), and the amounts seem quite reasonable.

Supplementary funding figures are also quite different between the JB and the OEB (the one application for Supplementary Funding before the EAB was denied). The JB has awarded $700,000 in supplementary funding, in one hearing, the Ontario Waste Management Corporation hazardous waste facility hearing, while the OEB has awarded a total of $70,000 in four hearings, with a fifth application being denied.

There are few costs decisions to date by the EAB/JB but the trend for all boards is that costs awards for funded intervenors almost always exceed the amount of the funding award and, in that sense are consistent with intervenor funding awards. Costs awards are to reflect the contribution made by the intervenor to the hearing.

SUBMISSIONS. There were over ninety submissions received from a wide range of perspectives, including individuals, interest and community groups, proponents, municipalities, provincial ministries and the Boards themselves. These submissions expressed overwhelming support for IFPA and considered its impact as positive on the decision-making process. Most respondents assumed that IFPA should continue and provided suggestions for improving its operation.

A few submissions expressed reservations about the concept of funding or the model chosen. An important concern was that the IFPA has benefited lawyers and consultants rather than the public interest intervenors themselves. Other concerns were that the funding seems open-ended and that it has a marginal impact on the quality of decisions. Most respondents preferred the model of proponent funding but a few suggested a different model, in particular, a costs based model.

Several respondents suggested that the IFPA should be expanded to other tribunals, particularly to the Ontario Municipal Board and the Environmental Appeal Board. But the submissions also discussed the difficulties of doing so particularly in light of the range of issues heard before these two boards.

A range of positions appeared on the question of who should make the funding decisions: the funding panel, the hearing board or an independent funding agency. The EAB supported the creation of an independent agency and, alternatively, recommended that the hearing board making all funding decisions. The OEB supported the hearing board making all funding decisions. Both boards support an amendment allowing them to appoint more than one member to make funding decisions and allowing them to dispense with oral hearings in most cases.

Many respondents supported the expansion of IFPA to include pre-hearing funding, particularly for projects under the Environmental Assessment process. This would allow intervenors to become involved in consultations and preparatory work prior to the time IFPA now comes into play, that is, when notice for a hearing is given.

The EAB supported an amendment to IFPA that would allow the hearing board to make a preliminary determination of issues and rulings on hearing format and jurisdictional issues prior to the funding panel deciding on the funding applications as a way of resolving the difficulties it has experienced.

The criteria for funding received much attention in the submissions. The OEB would dramatically change the criteria to drop the distinction between public and private issues, remove the criterion of need and make the predominant criterion that of anticipated contribution to the hearing, in order to align intervenor funding with the considerations involved in making costs awards. Most others would not go so far, although some suggest removing the test of financial need.

Two very different views on the requirement of a contribution from intervenors emerged. Some supported a contribution as a way of controlling expenses and monitoring of lawyers and consultants by intervenors while others were opposed to any contribution at all.

Two divergent views also emerged on the criterion of coordination. Some opposed it as creating artificial alliances between quite different organizations; others support the requirement in principle but object to certain applications where coordination was forced.

A number of issues arose in the submissions related to the level of funding. One issue was whether intervenors in hearings have been treated consistently. Another was the need to relate the requests of intervenors to the funds being expended by the proponent on the hearing. The EAB on this latter point would either set a limit on the amount public proponents could spend on a hearing or incorporate a requirement of proportionality between the costs of the proponent and the funds awarded to intervenors. Several respondents supported the removal of the limit on lawyers' fees to the legal aid rate. However, many respondents indicated that the limit had not proved a problem in practice.

The definition of "eligible disbursements" was considered by several submissions as being too narrow for needs of particular intervenors, including aboriginal intervenors. Changing this definition to a "reasonable and relevant" test applied by each panel was supported by both the EAB and the OEB.

Few submissions addressed the issue of supplementary funding or costs. One important issue with costs is the question of whether a holdback on a funding award in anticipation of a lower costs award is appropriate.

Other issues raised in the submissions include: difficulties with the process used for payment of funds to intervenors at the EAB; the role of Board staff at the OEB; the scheduling and location of hearings and other assistance to intervenors; special needs of aboriginal intervenors; whether municipalities should be eligible for funding; the appeal provisions; and special rules for complex hearings.

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

GENERAL CONSIDERATIONS. The primary conclusion after reviewing IFPA in operation over the term of the pilot project is that it has been effective in meeting its objectives of increasing access and improving the quality of participation and resulting decisions. The amounts that have been awarded do not seem out of line with present requirements for participation in administrative hearings, although knowing what proponents are spending would give a better gauge of the appropriate level of funding. It is recommended that IFPA be made permanent, subject to a number of considerations and modifications discussed below.

The primary conclusion about the effectiveness of IFPA does not capture some reservations about the operation of the pilot project. One reservation concerns the Ontario Hydro DSP hearing at the EAB. It is too soon to make any definitive judgments about the role of intervenor funding in that hearing and, because of the impact of the huge funds awarded, such judgments will be important for evaluating the impact of IFPA in this context. A second reservation applies to the OEB and its recommendations to eliminate need as the basis of intervenor funding decisions. This is rejected for reasons of administrative costs, costs to the proponent and the critical role need plays in focusing on issues of access. Third, there are a number of initiatives that are developing that could alter the context in which IFPA operates, including the Environmental Assessment process reforms in the Ministry of the Environment, the Environmental Bill of Rights and the Commission on Planning and Development Reform in Ontario. Fourth, there has been little time under the pilot project to fully apply the IFPA provisions regarding supplementary funding and costs. Because of these factors, it is recommended that the new legislation making IFPA permanent also provide for a review of the Act's operations at the end of a further three years.

FUNDING MODEL. The model for intervenor funding in the present IFPA, that is, funding by proponents, is recommended. This ensures that those most closely associated with the subject matter of a hearing and who are the focus of it will bear the costs of making that hearing full and fair. There are safeguards in the IFPA to protect proponents that truly cannot afford to fund intervenors and it is recommended that these, particularly

s. 8(3), be retained.

As indicated above, the *OEB's* model of funding is rejected. This model collapses any distinction between costs and intervenor funding by making the criteria for both those related to contribution to the hearing. With such a proposal, there is the potential that the purpose behind intervenor funding, to facilitate access by those without sufficient resources, will be frustrated.

EXPANSION TO OTHER TRIBUNALS. Although not asked to make recommendations regarding expansion to other tribunals, submissions were received on this issue. Expanded application of IFPA could be justified particularly with respect to the OMB and the Environmental Appeal Board. However, to determine the appropriate model to apply to these tribunals requires extensive consultation with those most directly affected. Therefore, it is recommended that consultation be carried out and a decision reached, at the latest, by the review of the IFPA, three years hence.

FUNDING DECISION-MAKER. The question of the most appropriate funding decision-maker is affected by policy considerations of independence and fairness and practical considerations of cost. While funding panels of the Boards have done an admirable job in implementing the pilot project, there have been difficulties in coordination with hearing boards. The adoption of the EAB's proposal for an independent funding agency is recommended contingent upon those receiving this report satisfying themselves regarding the costs and funding of such an agency. Any independent panel should be composed of representatives of all the constituencies involved in the process before the Board.

In any event, the IFPA should be amended to allow the decision-maker to appoint as many members of a funding panel as considered necessary. In addition, there should be an amendment to IFPA providing that an oral hearing may not be required for any funding decision and expressly stating that the Statutory Powers Procedure Act does not apply to funding decisions.

PROPONENT. The definition of proponent should be amended to permit the Board (particularly the OEB) to name a proponent in the event that the Board calls a generic hearing on its own motion.

EARLY FUNDING. Because of the growing importance of the pre-hearing phase particularly with respect to the environmental assessment process, the IFPA ought to be amended to apply, where relevant, to the pre-hearing phases of a decision-making process. Funding should be by the proponent. In addition, there should be monitoring of pre-hearing funding to ensure that it is, in fact, contributing to scoping and early resolution of issues between the parties.

SECTION 3(4) - STEPS HEARING BOARD CAN TAKE. The difficulties at the EAB with interpretation of this provision requires that this section be clarified. It is recommended that the IFPA be amended to allow hearing boards to determine the scope of a hearing, the relevant issues, the format of a hearing and any other rulings of a procedural or jurisdictional nature prior to the complete determination of funding applications. These matters are most appropriately made by hearing boards and not by funding panels. In addition, however, intervenors should be able to effectively participate in these determinations. Therefore, IFPA should be amended to allow a funding panel (however constituted) to determine entitlement to funding and to make awards for participation in these preliminary proceedings.

CRITERIA FOR FUNDING. The criteria for funding in s. 7 of IFPA have generally worked well to ensure that those intended to benefit from the Act have indeed done so. Subject to some modifications discussed below, the criteria in ss. 7(1) and 7(2) of IFPA ought to be retained. The recommendations of the OEB are rejected because funding should benefit those who raise issues affecting the public and those who are in need of assistance in order to participate.

However, a number of issues should be clarified. In particular, IFPA should be amended to make it clear that all of the criteria need not be met in every case. Further, IFPA should be amended to provide that the criteria of ascertainable interest (s 7(2)(a)) and separate and adequate representation (s.7(2)(b)) be determined with respect to the different perspectives of the intervenors. Finally, the requirement that intervenors attempt to bring related interests together in an umbrella group, while in principle promoting important goals, has been used in a few instances to force coalitions against the will of the intervenors without adequate justification. Therefore, the following should be added to s. 7(2)(f) of IFPA:

> Where it appears to the panel than an intervenor might coordinate its plan of activities with that of another funded intervenor without losing the ability to represent its separate and distinct perspective fully and effectively, all such intervenors have the burden of showing why such a coordinated plan of participation should not be a condition of funding for any intervenors concerned.

LEVEL OF FUNDING. Information about the costs of a proponent's participation in a hearing is very relevant to determining an appropriate level of funding but is not now considered by funding panels. It is recommended that IFPA be amended to require disclosure by proponents of the funds to be spent on the hearing and the total cost of the undertaking.

LEGAL AID RATES. Limiting lawyers' fees to the Legal Aid rate is a contentious issue for intervenors, however, in practice, this limitation has not led to demonstrable problems. Experienced and knowledgeable counsel do act for intervenors and any limitation at the front end is removed by costs awards where full fees are recoverable. The risk in most cases is, therefore, small and creates an incentive to conduct a quality intervention. Accordingly, s. 7(3)(a) of IFPA should be retained. In lengthy hearings, any potential for hardship can be relieved by awards of interim costs.

ELIGIBLE DISBURSEMENTS. The definition of "eligible disbursements" in s. 7(5) of IFPA is too narrow to meet the legitimate needs of intervenors. Therefore it is recommended that IFPA be amended to replace s. 7(5) with a provision giving funding panels the power to determine eligibility of disbursements in each case, using a test of relevance to representation of the interest and reasonableness in terms of the amount requested.

The present practice of allowing intervenors to shift funds within the three categories of lawyers' fees, consultants' fees and disbursements is a reasonable approach. If funds are to be shifted among these categories, the funding panel should have the power to so authorize, so long as it is within the limits of the original award.

SUPPLEMENTARY FUNDING. There has been little experience with the supplementary funding provisions of IFPA. Section 12 should be retained, subject to two comments. First, it is appropriate that the funding decision-maker (the funding panel) consider what has occurred in the hearing up to the time of the supplementary funding application. This is one reason it is not appropriate to have the hearing board be the decision-maker on supplementary funding applications. Second, the interpretation of the Boards of the requirement that the original award be "inadequate" to mean that there has been substantial and unanticipated change in the hearing is appropriate.

COSTS. There has also been little experience with costs and intervenor funding under IFPA particularly before the EAB/Joint Board. The trend at the OEB to require a repayment of a funding award if costs are awarded in a lower amount is inappropriate because it misconstrues the intent of intervenor funding by removing the certainty of funding for responsible intervenors. It is, therefore, recommended that s. 12(3) of IFPA be amended to prohibit the repayment of a funding award which is actually and reasonably expended. Irresponsible behaviour is addressed in s. 9(2). This section should be retained.

The approach to assessing costs varies between the EAB/JB and the OEB. The OEB leaves the task to an assessment officer, which is a preferable practice which should be adopted by the EAB.

PAYMENTS OF FUNDS AND ACCOUNTING FOR FUNDS. The OEB's approach to the payment of funds, that is, in lump sums to intervenors' lawyers, is preferable to the practice of the EAB. The EAB's practice has led to delays in payments and is, therefore, needlessly troublesome for intervenors. However, there should be no holdback on those funds. The IFPA should be amended to prohibit the imposition of a holdback on funding awards. Ideally, the EAB's recommendation of an independent agency to both make funding decisions and administer and monitor awards can be implemented.

OEB STAFF. Although with intervenor funding there is a greater risk that intervenors and OEB staff will duplicate some work, it is appropriate that OEB staff continue to play an important role in hearings. However, guidelines are necessary to ensure the consideration of coordination between Board staff and intervenors is done consistently. It is recommended that an intervenor seeking funding demonstrate a reasonable attempt to coordinate with Board staff: Board staff should be required to articulate a plan of coordination within a reasonable time and the intervenors should be required to respond. The plan and the response should then be considered by the funding panel in making its determination.

SCHEDULING AND LOCATION OF HEARINGS; ASSISTANCE TO INTERVENORS. Efforts to hold hearings in local centres and at flexible times to accomodate less traditional intervenors are important ways of making hearings more accessible. It is recommended that the Boards' rules be amended to require them to consult with intervenors when establishing hearing locations and schedules. Other assistance to intervenors, including provision of information about IFPA generally, filling out funding applications and supplementary funding should be encouraged. Establishment of an independent panel of experts as recommended by the EAB to the EA Task Force and a roster of lawyers should also be considered.

ABORIGINAL GROUPS. Because few submissions were received addressing the impacts of IFPA on aboriginal groups, it is not appropriate to reach conclusions and make recommendations regarding specific changes. A special study should be commissioned to consider the needs of aboriginal peoples in hearings to which IFPA applies. Such a study should not be unduly costly or prolonged, should include aboriginal peoples in its design and conduct and should consider the impacts of its recommendations on other regional interests, who should also be involved in the study.

MUNICIPALITIES. The funding of municipalities is a contentious issue but it is appropriate where municipalities can demonstrate need. However, the IFPA should be amended to make clear that coordination between municipalities and other intervenors not be forced using the assumption that a municipality represents the interests of its citizens.

APPEAL AND REVIEW OF DECISIONS. The present appeal mechanism, limited to an appeal on a question of law, is appropriate given the complex task of funding panels and should be retained. It should not be extended to provide for a "political" appeal to a minister or cabinet. Any appeal of a funding decision should be exercised expeditiously and should not trigger a stay of proceedings. Therefore, IFPA ought to be amended to provide that an appeal be launched within thirty days of a funding decision, unless it can be demonstrated to the court that no substantial prejudice will result. In addition, the IFPA should be amended to allow a funding panel to make funding available for intervenors participating in appeals and applications for judicial review.

SPECIAL RULES FOR COMPLEX AND LENGTHY HEARINGS. There is a need, particularly with EAB and Joint Board hearings to develop special rules for application, as needed, to complex and lengthy hearings. Because the needs of the participants will vary greatly from hearing to hearing, these rules should be applicable at the discretion of the funding panel. Some of the details that should be included in these rules relate to: early funding; staging of funding; periodic asessment of the use of funds and the discharge of obligations to other intervenors; periodic awarding of interim costs.

# SOMMAIRE : ACCÈS ET IMPACT

## SOMMAIRE : ACCÈS ET IMPACT

Ce rapport présente les résultats d'une évaluation des effets la Loi de 1988 sur le projet d'aide financière aux intervenants de l'Ontario (la Loi), évaluation entreprise pour le compte des ministères du Procureur général, de l'Énergie et de l'Environnement. La Loi a prévu un projet-pilote de trois ans, dans le cadre duquel une aide financière est accordée aux intervenants qui représentent l'intérêt public dans les audiences tenues par la Commission des évaluations environnementales, les commissions mixtes et la Commission de l'énergie de l'Ontario; à cet effet, elle a modifié les lois organiques de ces autorités pour ce qui est de leurs pouvoirs en matière de dépens. Ce rapport examine dans quelle mesure le projet-pilote a atteint ses objectifs.

La Loi a été adoptée afin d'accroître les possibilités de participation au processus de prise de décisions administratives pour ceux qui cherchent à soulever des questions d'intérêt public et qui, par le passé, n'ont pu le faire ou l'ont fait de façon très limitée en raison de leur manque de ressources. Un accès accru doit ajouter à l'équité des décisions et, en présentant au public plus d'informations ainsi que des points de vue différents, améliorer la qualité des décisions, du fait d'une responsabilité publique accrue des autorités décisionnelles et d'une meilleure acceptation de la part du public.

MÉTHODOLOGIE. Cette évaluation a été entreprise sur une période de quatre mois, d'octobre 1991 à janvier 1992. Toutes les demandes d'aide financière faites sous le régime de la Loi ont fait l'objet d'un examen exhaustif, en vue d'une évaluation quantitative de l'application de cette dernière. En outre, ceux qui ont été touchés par la Loi ou qui s'y intéressaient ont été invités à soumettre un mémoire; c'est ainsi que plus de 90 mémoires ont été reçus de la part de proposants, d'intervenants, d'avocats, d'experts-conseils, d'observateurs et des commissions intéressées elles-mêmes, qui représentent un large éventail de points de vue sur le présent et l'avenir de l'aide financière aux intervenants en général, et de la Loi en particulier. Des recherches documentaires ont été entreprises pour retrouver les évaluations d'autres modèles d'aide financière aux intervenants en usage dans d'autres ressorts. Il y a eu aussi un certain nombre d'entrevues.

RAPPORT. Ce rapport est divisé en trois parties principales. La première, «Historique et contexte de la Loi de 1988 sur le projet d'aide financière aux intervenants», évoque les objectifs de cette loi, les événements qui ont précédé son adoption en 1988 et les initiatives connexes en cours qui pourraient avoir un effet sur la Loi et sur sa portée. Cette partie donne également un aperçu du mode d'application de la Loi et de la nature des audiences soumises à son application. La partie I se termine par l'examen détaillé des motifs de décision des comités d'aide financière et des commissions qui ont accordé une aide financière supplémentaire; cet examen permet de dégager ce qu'ont fait les commissions pour parvenir à une interprétation cohérente de la Loi par son application au fil des cas d'espèce.

La partie II présente les résultats de l'examen des dossiers et des mémoires soumis. En premier lieu, les conclusions quantitatives sont illustrées par des tableaux et analysées dans le texte. En second lieu, des extraits de mémoire sont présentés en détail afin que les opinions qu'ils expriment soient portées à l'attention de ceux qui décideront du sort de la Loi et afin que les répondants savent ce que pensent les autres.

La partie III du rapport présente les conclusions sur l'application de la Loi pendant la durée du projet-pilote ainsi que les recommandations de modification de la Loi ou des règles connexes. Le rapport comprend enfin diverses annexes : copie des lettres portant demande de mémoire, le document de travail, la méthode utilisée pour l'examen des dossiers et documents semblables, le texte de la Loi elle-même.

## RÉSULTATS

OBSERVATIONS D'ORDRE GÉNÉRAL. La Loi sur le projet d'aide financière aux intervenants vise à accroître l'accès du public au processus de prise de décisions administratives dans le contexte limité des audiences de la Commission des évaluations environnementales (CEE), des commissions mixtes créées en application de la Loi sur la jonction des audiences, et de la Commission de l'énergie de l'Ontario (CEO). À cet effet, elle prévoit pour les proposants l'obligation d'accorder des fonds aux intervenants qui soulèvent des questions d'intérêt public et qui satisfont à certains critères d'admissibilité. De cette façon, la Loi assure un certain équilibre entre les intérêts des intervenants et ceux des proposants. Bien qu'elle s'applique dans ce contexte très limité, ses objectifs sous-jacents pourraient s'appliquer à un contexte bien plus général embrassant à la fois les décisions administratives dans leur acception la plus large et tous les domaines où les grandes orientations sont décidées par voie législative.

La Loi a son origine dans les efforts visant à subventionner les intervenants par l'exercice des pouvoirs en matière de dépens et par l'octroi ad hoc de fonds publics. L'événement qui a précipité l'adoption de la Loi fut la décision Re Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee par laquelle la Cour divisionnaire a, en 1985, interdit à une commission mixte d'allouer les dépens aux intervenants avant la fin de l'audience. Un programme gouvernemental d'aide financière ad hoc, établi à la suite de la décision Hamilton-Wentworth, a été remplacé le 1$^{er}$ avril 1989 par le projet-pilote prévu à la partie I de la Loi. La Partie II de la Loi habilite la Commission des évaluations environnementales à allouer les dépens, et prend expressément le contre-pied de la décision Hamilton-Wentworth en prévoyant que les commissions compétentes ne sont pas limitées aux critères applicables aux dépens judiciaires. Cette partie II n'est pas soumise à la limitation de trois ans.

La Loi crée un modèle d'aide financière unique en son genre en ce qu'il est centré sur le besoin et sur l'accès. Dans d'autres ressorts, la méthode la plus courante d'aide financière aux intervenants dans les audiences administratives consiste à faire rembourser les dépens par un proposant. Dans un nombre limité de cas, les dépens provisionnels ont été accordés aux intervenants qui n'avaient pas les fonds nécessaires pour participer aux audiences. Une autre méthode courante consiste à accorder des fonds publics aux intervenants dans certaines audiences. La plupart du temps, il s'agit là d'un processus ad hoc, les critères et le montant variant d'un cas à l'autre. On trouve un exemple de transition dans le programme fédéral d'aide financière aux intervenants devant les comités d'examen des répercussions sur l'environnement : le processus ad hoc y a été abandonné et remplacé par un processus institutionnalisé. Les gouvernements mettent aussi des fonds à la disposition d'intervenants au moyen de programmes d'aide juridique, de défenseurs de l'intérêt public et de fonds spéciaux pour certaines catégories d'affaires, telles les actions collectives et les actions fondées sur la Charte. Enfin, les intervenants peuvent aussi recevoir une subvention du Canadian Environmental Defence Fund et du Fonds d'action et d'éducation juridiques des femmes. Tous ces programmes ajoutent dans une certaine mesure à l'aptitude des intervenants représentant l'intérêt public à participer au processus de prise de décisions; il se trouve cependant que chaque modèle a ses propres limitations.

DÉCISIONS DES COMMISSIONS. Les commissions qui appliquent la Loi au cours des trois dernières années ont dû faire face à un grand nombre de difficultés dans son interprétation, mais elles s'y sont attaquées en tenant compte à la fois des objectifs généraux de la Loi et des circonstances particulières de chaque cas d'espèce. Les décisions qui en résultent forment un corps d'interprétation de la Loi, dans lequel on peut puiser pour découvrir certaines limitations de ses dispositions dans leur application pratique.

Il ressort de leurs décisions que la CEE, les commissions mixtes et la CEO interprètent la Loi de la même façon à l'égard de la plupart des questions, mais ont des points de vue divergents quant à d'autres. Elles partagent les mêmes opinions au sujet de l'objectif de la Loi, de la nécessité de satisfaire à tous les critères dans la plupart des cas, de l'avantage d'une contribution raisonnable des intervenants si possible, de l'avantage de la coordination pour éviter le double emploi, et font preuve de la même souplesse à l'égard de l'impératif qui veut que l'intervenant se soit «prononcé et engagé en faveur de l'intérêt par le passé».

La grande divergence entre la CEO d'une part et la CEE et les commissions mixtes d'autre part se fait jour à propos des mesures que prend la commission avant que le comité d'aide financière ne rende sa décision en la matière. La CEO consacre une journée à dégager, avant l'audience sur l'aide financière, les questions qui seront probablement examinées lors de l'audience proprement dite.

Cette pratique est inconnue de la CEE et des commissions mixtes, qui laissent au comité d'aide financière le soin de relever les questions qui seront probablement examinées à l'audience principale. Cette manière de procéder a causé des problèmes aux comités d'aide financière de la CEE dans les cas complexes. Une autre divergence concerne la question de la retenue d'une partie de l'aide financière en prévision du cas où les dépens adjugés à la fin de l'audience seraient inférieurs au montant de l'aide accordée. La CEO estime que l'excédent de l'aide financière sur les dépens doit être remboursé, alors que pour la CEE, l'aide financière n'est pas remboursable s'il n'y a pas mauvaise foi, quelle que soit l'issue de l'audience principale pour ce qui est des dépens adjugés.

Les différents comités d'aide financière de chaque commission se contredisent aussi au sujet de certaines questions. Cette contradiction se trouve surtout, chez la CEE, les commissions mixtes comme chez la CEO, dans la question de savoir dans quelle mesure un comité d'aide financière forcera un regroupement des intervenants qui n'y tiennent pas.

EXAMEN DES DOSSIERS. Le dépouillement des dossiers des 22 cas d'aide financière aux intervenants a fait ressortir des données importantes qui peuvent servir aux fins de comparaison. Au 15 décembre 1991, le total de l'aide financière accordée sous le régime de la Loi s'élevait à quelque 25 millions de dollars, répartis entre 71 intervenants. Sur ce total, 24 millions de dollars ont été accordés par la CEE et les commissions mixtes, et 930 000 $ par la CEO. La plupart des demandeurs d'aide financière étaient des intervenants dans les audiences de la CEE et des commissions mixtes, et leur taux de succès était un peu plus élevé. Cette différence globale entre les deux commissions est cependant trompeuse, puisque sur les 24 millions de dollars accordés par la CEE et les commissions mixtes, 23 millions l'ont été au titre d'une seule audience, celle qui était consacrée au plan de prévision de la demande et de l'offre d'Ontario Hydro, sous le régime de la Loi sur les évaluations environnementales. Si cette audience est exclue des chiffres concernant la CEE et les commissions mixtes, il y a une grande similarité entre la CEE et la CEO pour ce qui est du total et de la moyenne des sommes accordées (environ 50 000 $), lesquelles semblent bien raisonnables.

Les chiffres relatifs à l'aide financière supplémentaire sont aussi fort différents entre les commissions mixtes et la CEO (la seule demande d'aide financière supplémentaire faite à la CEE ayant été rejetée). Il y a eu une aide financière supplémentaire de commission mixte, 700 000 dollars, pour une seule audience, celle que tenait la Société ontarienne de gestion des déchets au sujet d'un dépotoir de déchets dangereux, alors que de son côté, la CEO a accordé un total de 70 000 $ pour quatre audiences, une cinquième demande ayant été rejetée.

Il y a eu jusqu'ici peu de décisions rendues par la CEE ou les commissions mixtes en matière de dépens, mais on constate une tendance générale chez toutes les commissions à allouer aux intervenants bénéficiant de l'aide financière des dépens supérieurs au montant de l'aide accordée, ce qui, dans un sens, est conforme à l'esprit de l'aide financière aux intervenants. Les dépens accordés constituent la reconnaissance de la contribution apportée par l'intervenant à l'audience.

MÉMOIRES. Plus de 90 mémoires ont été reçus qui représentent un large éventail de points de vue, exprimés par des particuliers, des groupes d'intérêt et organisations communautaires, des proposants, des municipalités, des ministères du gouvernement provincial et les commissions elles-mêmes. Ces mémoires se prononcent tous en faveur de la Loi, qu'ils considèrent comme ayant un effet positif sur le processus de prise de décisions. La plupart des répondants présument que la Loi serait maintenue et font des suggestions d'amélioration.

Quelques mémoires expriment des réserves sur le concept d'aide financière ou sur le modèle choisi. Un sujet de préoccupation majeur est que la Loi a profité aux avocats et aux experts-conseils, et non pas aux intervenants représentant l'intérêt public eux-mêmes. D'autres se préoccupent de ce que l'aide financière semble sans limites et qu'elle a un effet marginal sur la qualité des décisions ultimes. La plupart des répondants préfèrent le modèle de l'aide financière à la charge du proposant, mais un petit nombre suggèrent un autre modèle, en particulier celui fondé sur les dépens.

Plusieurs répondants suggèrent d'étendre l'application de la Loi à d'autres tribunaux administratifs, en particulier à la Commission des affaires municipales de l'Ontario et à la Commission d'appel de l'environnement. Cependant, les mémoires en la matière font aussi état des difficultés que présenterait pareille extension, à la lumière en particulier de la grande diversité des affaires dont connaissent ces deux organismes.

Différentes opinions ont été exprimées quant à la question de savoir qui doit décider de l'aide financière : le comité d'aide financière, la commission elle-même ou un organisme indépendant d'aide financière aux intervenants. La CEE est en faveur de la création d'un organisme indépendant, faute de quoi elle recommande de laisser le soin de toutes les décisions d'aide financière à la commission tenant l'audience. C'est cette dernière solution que préconise la CEO. Les deux commissions recommandent une modification qui les habilite à nommer plus d'un membre pour prendre les décisions d'aide financière et qui les dispense des audiences orales dans la plupart des cas.

De nombreux répondants recommandent d'étendre la Loi aux interventions dans les phases précédant l'audience proprement dite, en particulier à l'égard des projets soumis au processus d'évaluation environnementale. Les intervenants pourraient ainsi prendre part aux consultations et aux travaux préparatoires avant l'étape où la Loi entre en jeu à l'heure actuelle, savoir avant la date de l'avis d'audience.

La CEE préconise, en vue de résoudre les difficultés qu'elle a connues, une modification de la Loi qui habilite la commission tenant l'audience à rendre une décision préliminaire sur les questions à examiner ainsi que sur les modalités de l'audience et les questions de compétence, avant que le comité d'aide financière ne se prononce sur les demandes en la matière.

Les critères de l'aide financière retiennent beaucoup l'attention dans les mémoires. La CEO préconise une modification profonde des critères pour abandonner la distinction entre questions publiques et questions privées, supprimer le critère du besoin et faire de la contribution prévue à l'audience le critère prédominant, afin d'aligner l'aide financière aux intervenants sur les considérations entrant en ligne de compte dans l'allocation des dépens. La plupart des autres n'iraient pas aussi loin, bien que certains recommandent de supprimer le critère du besoin financier.

Deux points de vue divergents se dégagent au sujet de l'impératif d'une contribution de la part des intervenants. Certains préconisent cette contribution à titre de mesure de contrôle des dépenses et de surveillance des avocats et experts-conseils par les intervenants, alors que d'autres s'opposent à toute idée de contribution.

Le critère de la coordination a également suscité des opinions divergentes. Certains y voient la création d'alliances artificielles entre des organisations tout à fait différentes; d'autres sont en faveur du principe, mais s'opposent à ce que la coordination soit imposée dans le cas de certaines demandes.

Diverses questions se font jour au sujet du niveau de l'aide financière. L'une des questions qui se posent est de savoir si les intervenants dans les audiences ont été traités sur le même pied. Une autre porte sur la nécessité d'établir un rapport entre les demandes des intervenants et les fonds dépensés par le proposant pour l'audience. À ce dernier sujet, la CEE recommande soit de fixer une limite pour la somme que les proposants publics pourraient dépenser pour une audience, soit de prévoir un rapport déterminé entre les coûts du proposant et les fonds accordés aux intervenants. Plusieurs répondants recommandent de supprimer la limitation des honoraires d'avocat au barème de l'Aide juridique. Cependant plusieurs autres font observer que cette limite n'a pas causé de problèmes dans les faits.

Dans plusieurs mémoires, la définition de «débours remboursables» est jugée trop étroite au regard des besoins de certains intervenants, dont les autochtones. La CEE et la CEO recommandent toutes deux que cette définition soit remplacée par le critère des dépenses «utiles et raisonnables» appliqué par chaque comité d'aide financière.

Peu de mémoires portent sur la question de l'aide financière supplémentaire ou des dépens. L'une des principales questions qui se posent au sujet des dépens est de savoir s'il est justifié de retenir une partie de l'aide en prévision des dépens accordés dont le montant serait inférieur.

Parmi les autres questions soulevées dans les mémoires, on peut citer : les difficultés causées par le mode de versement des fonds aux intervenants devant la CEE, le rôle du personnel de la CEO, la fixation de l'horaire et du lieu des audiences et d'autres formes d'aide aux intervenants, les besoins spéciaux des intervenants autochtones, la question de l'admissibilité des municipalités à l'aide financière, les dispositions relatives aux appels, les règles spéciales pour les audiences complexes.

## SOMMAIRE DES CONCLUSIONS ET DES RECOMMANDATIONS

CONSIDÉRATIONS D'ORDRE GÉNÉRAL. La conclusion première qui se dégage de l'examen de l'application de la Loi pendant la durée du projet-pilote est qu'elle a atteint ses objectifs, savoir accroître l'accès du public et améliorer la qualité de la participation ainsi que des décisions ultimes. Les montants accordés ne semblent pas disproportionnés par rapport aux impératifs actuels en matière de participation aux audiences administratives, bien qu'on eût pu mieux mesurer le niveau d'aide convenable si on savait à combien se montent les dépenses du proposant. Il est recommandé que la Loi devienne une institution permanente, sous réserve de certaines considérations et modifications dont l'analyse suit.

La conclusion première au sujet de l'efficacité de la Loi ne traduit pas certaines réserves exprimées au sujet du fonctionnement du projet-pilote. L'une de ces réserves porte sur l'audience tenue par la CEE pour examiner le plan de prévision de la demande et de l'offre d'Ontario Hydro. Il est encore trop tôt pour passer un jugement définitif sur les effets de l'aide financière aux intervenants sur cette audience et, vu l'impact des sommes énormes accordées, pareil jugement sera de première importance dans l'évaluation des effets de la Loi dans ce contexte. Une deuxième réserve s'impose au sujet de la recommandation faite par la CEO de supprimer le besoin à titre de critère de l'aide financière aux intervenants. Cette suggestion est rejetée compte tenu des coûts administratifs, des coûts à la charge du proposant et du rôle crucial que joue le besoin pour focaliser l'attention sur les questions d'accès. En troisième lieu, il y a certaines initiatives en cours qui pourraient changer le contexte dans lequel la Loi s'applique; il faut citer entre autres la réforme du processus d'évaluation environnementale au ministère de l'Environnement, la Déclaration des droits en matière d'environnement et la Commission sur la réforme de l'aménagement et de l'exploitation du territoire en Ontario. En quatrième lieu, la durée du projet-pilote n'était pas assez longue pour permettre la pleine application des dispositions de la Loi sur l'aide financière supplémentaire et sur les dépens. En raison de ces facteurs, il est recommandé que la nouvelle mesure législative faisant de la Loi une institution permanente prévoie aussi un examen des résultats de son application au bout de trois ans.

MODÈLE D'AIDE FINANCIÈRE. Le modèle recommandé pour l'aide financière aux intervenants est celui que prévoit la Loi dans sa forme actuelle, c'est-à-dire le modèle de l'aide financière à la charge du proposant. Dans ce modèle, ceux qui ont le plus grand intérêt dans le sujet de l'audience et qui sont le point de mire de cette dernière supporteront les coûts nécessaires pour garantir une audience complète et impartiale. La Loi comporte des garanties pour protéger les proposants qui ne peuvent vraiment pas verser des fonds aux intervenants, et il est recommandé que ces garanties, en particulier le paragraphe 8(3), soient conservées.

Comme indiqué plus haut, le modèle proposé par la CEO est rejeté. Il efface toute distinction entre dépens et aide financière aux intervenants en assujettissant les critères des deux catégories à la contribution à l'audience. Pareille proposition pourrait avoir pour résultat de faire échec à l'objectif qui sous-tend l'aide aux intervenants et qui est de faciliter l'accès à ceux qui n'ont pas les ressources suffisantes.

EXTENSION À D'AUTRES TRIBUNAUX ADMINISTRATIFS. Bien que les répondants n'aient pas été invités à faire des recommandations sur une extension possible de la Loi à d'autres tribunaux administratifs, certains mémoires ont invoqué cette question. Une extension de l'application de la Loi pourrait se justifier, en particulier à l'égard de la Commission des affaires municipales de l'Ontario et la Commission d'appel de l'environnement. Il est cependant nécessaire, pour savoir quel modèle convient à ces organismes, de procéder à de larges consultations auprès de ceux qui sont le plus directement touchés. Il est donc recommandé de procéder aux consultations et d'arriver à une décision en la matière, d'ici à la fin de la période d'examen des résultats de la Loi, c'est-à-dire d'ici à trois ans.

AUTORITÉ DÉCISIONNELLE. La question de savoir quelle est l'autorité la plus indiquée pour décider de l'aide financière aux intervenants est subordonnée aux considérations stratégiques d'indépendance et d'équité ainsi qu'aux considérations pratiques de coût. Si les comités d'aide financière des commissions intéressées ont fait un travail admirable dans la mise en oeuvre du projet-pilote, il y a eu quand même des difficultés dans la coordination avec les commissions elles-mêmes. Il est recommandé d'adopter la proposition de la CEE d'un organisme indépendant d'aide financière, à condition que les autorités auxquelles ce rapport est destiné approuvent les coûts et le financement d'un organisme de ce genre. Tout comité indépendant devrait être composé des représentants de toutes les parties intéressées dans le processus devant la commission compétente.

Quoi qu'il en soit, il faut modifier la Loi de façon à habiliter l'autorité décisionnelle à nommer au comité d'aide financière autant de membres qu'elle le juge nécessaire. En outre, il faut modifier la Loi de façon à prévoir qu'une audience orale n'est pas absolument nécessaire pour toute décision d'aide financière et à prévoir expressément que la Loi sur l'exercice des compétences légales ne s'applique pas en la matière.

PROPOSANT. Il faut modifier la définition de proposant de façon que la commission compétente (en particulier la CEO) puisse désigner un proposant au cas où elle convoquerait une audience générique de son propre chef.

AIDE FINANCIÈRE PRÉLIMINAIRE. Vu l'importance croissante des phases préparatoires de l'audience proprement dite, particulièrement en ce qui concerne le processus d'évaluation environnementale, il faut modifier la Loi de façon qu'elle s'applique, le cas échéant, aux phases du processus décisionnel qui précèdent l'audience. L'aide financière dans ce cas sera à la charge du proposant. En outre, il faut établir un mécanisme de surveillance de l'aide financière visant les phases préparatoires pour s'assurer qu'elle contribue effectivement à circonscrire et à résoudre dès le début les points litigieux entre les parties.

PARAGRAPHE 3(4) - MESURES QUE PEUT PRENDRE LA COMMISSION. Par suite des difficultés que la CEE a éprouvées dans son interprétation, il s'agit de clarifier cette disposition. Il est recommandé que la Loi soit modifiée de façon à habiliter la commission compétente à se prononcer sur la portée de l'audience, sur les questions à examiner, sur les modalités de l'audience et sur toute autre question de procédure ou de compétence, avant l'instruction au fond des demandes d'aide financière. Ces questions relèvent à juste titre de la commission, et non du comité d'aide financière. En outre, il faut que les intervenants soient à même de participer réellement à leur examen. Il faut donc modifier la Loi de façon à habiliter le comité d'aide financière (quel qu'en soit le mode de constitution) à se prononcer sur l'admissibilité à cette aide et à accorder des fonds pour la participation à l'examen préliminaire.

CRITÈRES DE L'AIDE FINANCIÈRE. Les critères de l'aide financière, définis à l'article 7 de la Loi, ont dans l'ensemble atteint leur but qui est de garantir que la Loi s'applique en faveur de ceux auxquels elle est destinée. Sous réserve des modifications analysées ci-dessous, il faut conserver les paragraphes 7(1) et 7(2) de la Loi. Les recommandations de la CEO sont rejetées parce que l'aide financière doit aller à ceux qui soulèvent des questions d'intérêt public et à ceux qui ont besoin d'aide pour participer. Il faut cependant clarifier certaines questions. En particulier, il faut modifier la Loi de façon à prévoir expressément qu'il n'est pas nécessaire de satisfaire à tous les critères dans chaque cas. En outre, il faut modifier la Loi de façon à prévoir que les critères de l'intérêt bien établi (alinéa 7(2)a)) et de la représentation distincte et satisfaisante (alinéa 7(2)b)) s'appliquent compte tenu des points de vue différents des intervenants. Enfin, l'obligation faite aux intervenants d'effectuer un regroupement d'intérêts connexes, si elle vise en principe à promouvoir des objectifs importants, a servi dans certains cas à imposer un regroupement contre la volonté des intervenants et sans justification suffisante. Il faut donc ajouter ce qui suit à l'alinéa 7(2)f) de la Loi :

> Dans le cas où le comité d'aide financière constate qu'un intervenant pourrait, sans pour autant perdre son aptitude à faire pleinement valoir son propre point de vue, coordonner son plan d'activité avec celui d'autres intervenants bénéficiant d'une aide financière, il incombe à tous les intervenants intéressés de montrer pourquoi pareille coordination ne devrait pas constituer une condition de l'aide financière pour l'un quelconque d'entre eux.

NIVEAU DE L'AIDE FINANCIÈRE. Les informations relatives au coût de la participation d'un proposant à l'audience, qui pourraient être très utiles pour le calcul d'un niveau d'aide financière satisfaisant, ne sont pas prises en considération par les comités d'aide financière à l'heure actuelle. Il est recommandé que la Loi soit modifiée de façon à prévoir pour les proposants l'obligation de divulguer les sommes qu'ils vont dépenser pour l'audience ainsi que le coût total de l'entreprise.

BARÈME DE L'AIDE JURIDIQUE. Les intervenants contestent la limitation des honoraires d'avocat au barème de l'Aide juridique. Dans les faits cependant, cette limitation n'a pas vraiment causé de problèmes. Il se trouve des avocats expérimentés et compétents pour représenter les intervenants, et toute limitation au début du processus est compensée à la fin par les dépens dans les cas où les honoraires sont intégralement recouvrables. Par conséquent, le risque est infime dans la plupart des cas et encourage à assurer la qualité de l'intervention. Il faut donc conserver l'alinéa 7(3)a) de la Loi. En cas d'audience qui prend beaucoup de temps, toute possibilité de préjudice peut être neutralisée par l'octroi de dépens provisionnels.

DÉBOURS REMBOURSABLES. La définition de «débours remboursables» au paragraphe 7(5) de la Loi est trop étroite pour répondre aux besoins légitimes des intervenants. Il est donc recommandé de modifier la Loi en remplaçant son paragraphe 7(5) par une disposition habilitant le comité d'aide financière à juger de l'admissibilité des débours dans chaque cas d'espèce, à la lumière du critère de l'utilité au regard de la représentation de l'intérêt en cause et du caractère raisonnable du montant demandé.

La pratique actuelle qui consiste à permettre aux intervenants de réaffecter les fonds à l'intérieur des trois catégories, savoir les honoraires d'avocat, les honoraires d'expert-conseil et les débours, constitue une méthode raisonnable. S'il est entendu que les fonds peuvent être réaffectés d'une catégorie à l'autre, il faut que le comité d'aide financière soit habilité à en donner l'autorisation, à condition que la réaffectation reste dans les limites de l'aide initiale.

AIDE FINANCIÈRE SUPPLÉMENTAIRE. Il n'y a eu guère de cas d'application des dispositions de la Loi relatives à l'aide financière supplémentaire. Il faut conserver l'article 12, sous réserve des deux observations suivantes. Premièrement, il convient que l'autorité décisionnelle (c'est-à-dire le comité d'aide financière) examine ce qui s'est passé au cours de l'audience jusqu'au moment de la demande de fonds supplémentaires. C'est d'ailleurs pour cette raison que la commission ne devrait pas être l'autorité qui décide de l'aide supplémentaire. Deuxièmement, les commissions sont fondées à interpréter la condition que le montant initialement accordé soit insuffisant, comme signifiant qu'il s'est produit un changement considérable et imprévu dans l'audience.

DÉPENS. De même, il n'y a eu guère de cas où l'on peut établir la corrélation entre les dépens et l'aide financière accordée en application de la Loi, en particulier dans les audiences de la CEE ou des commissions mixtes. La tendance de la CEO à ordonner le remboursement d'une partie de l'aide financière accordée si les dépens adjugés sont inférieurs n'est pas justifiée, car elle représente une mauvaise interprétation de l'esprit de l'aide financière en supprimant toute certitude en la matière pour les intervenants sérieux. Il est par conséquent recommandé que le paragraphe 12(3) de la Loi soit modifié de façon à interdire le remboursement d'une aide financière qui a été effectivement et raisonnablement dépensée. Les comportements irresponsables sont sanctionnés par le paragraphe 9(2), qu'il faut conserver.

La méthode de fixation des dépens varie entre la CEE, les commissions mixtes et la CEO, laquelle en laisse le soin à un agent d'évaluation, ce qui constitue une pratique préférable que devrait adopter la CEE.

VERSEMENT DES FONDS ET COMPTABILITÉ. La pratique observée par la CEO, qui consiste à verser l'aide financière sous forme de sommes forfaitaires entre les mains des avocats des intervenants, est préférable à la pratique de la CEE, qui a provoqué des retards dans les versements, causant ainsi des problèmes inutiles aux intervenants. Il ne faut cependant pas que les fonds accordés fassent l'objet d'aucune retenue. Il faut modifier la Loi de façon à interdire toute retenue sur le montant de l'aide financière. La solution idéale serait la création d'un organisme indépendant, tel que le recommande la CEE, pour décider de l'aide financière puis administrer et surveiller les fonds accordés.

PERSONNEL DE LA CEO. Bien que l'aide financière aux intervenants ajoute au risque de double emploi entre ces derniers et le personnel technique de la CEO, celui-ci a toujours un rôle important à jouer dans les audiences. Il faut cependant établir des lignes directrices pour faire en sorte que la coordination entre ce personnel et les intervenants soit envisagée dans tous les cas. Il est recommandé que tout intervenant demandant une aide financière soit tenu de démontrer qu'il a fait des efforts raisonnables pour coordonner avec le personnel de la commission, et que celui-ci soit tenu de formuler un plan de coordination dans un délai raisonnable, auquel les intervenants seront tenus de répondre. Le comité d'aide financière devra prendre en considération et le plan de coordination et la réponse pour rendre sa décision en conséquence.

LIEU ET HORAIRE DES AUDIENCES; AIDE AUX INTERVENANTS. La tenue des audiences dans les centres locaux et selon un horaire flexible pour permettre la participation d'intervenants inhabituels représente une méthode importante d'accroissement de l'accessibilité des audiences. Il est recommandé que les règlements des commissions soient modifiés de façon à prévoir pour ces dernières l'obligation de consulter les intervenants sur la fixation du lieu et de l'horaire des audiences. Il faut envisager aussi d'autres formes d'aide aux intervenants, par exemple la diffusion d'informations sur la Loi, sur la manière de remplir les demandes d'aide financière et d'aide financière supplémentaire. Il faut aussi étudier la possibilité de création d'un rôle d'avocats ainsi que d'un comité d'experts impartiaux, tel que l'a recommandé la CEE au Groupe d'étude sur les évaluations environnementales.

GROUPES AUTOCHTONES. Les mémoires reçus ne portant guère sur l'impact de la Loi sur les groupes autochtones, il n'y a pas lieu de tirer des conclusions ni de faire des recommandations pour ce qui est des changements spécifiques. Il faut faire effectuer une étude spéciale sur les besoins des autochtones dans les audiences soumises à l'application de la Loi. Il ne faut pas que cette étude soit excessivement coûteuse ni qu'elle prenne trop de temps; des autochtones devront participer à la formulation et à la conduite de cette étude, qui devra examiner les répercussions de ses recommandations sur d'autres intérêts régionaux, lesquels devront aussi y participer.

MUNICIPALITÉS. La question de l'aide financière aux municipalités prête à controverse, mais cette aide est indiquée dans les cas où la municipalité intéressée peut en prouver le besoin. Il faut cependant modifier la Loi de façon à prévoir expressément que la coordination entre les municipalités et d'autres intervenants ne peut être forcée par suite de la présomption que toute municipalité représente les intérêts de ses citoyens.

APPEL ET CONTRÔLE JUDICIAIRE DES DÉCISIONS. Il faut conserver le mécanisme d'appel en vigueur à l'heure actuelle, qui est limité aux questions de droit et constitue le système qui convient eu égard à la complexité du travail des comités d'aide financière. Il ne faut pas qu'il soit élargi jusqu'à l'appel «politique» au gouvernement ou à un de ses ministres. L'appel formé contre une décision en matière d'aide financière doit être exercé dans les plus brefs délais et ne doit pas entraîner la suspension de l'instance. Il faut donc modifier la Loi de façon à prévoir que l'appel soit interjeté dans les trente jours qui suivent la décision en matière d'aide financière, à moins que la preuve ne soit faite devant le tribunal compétent qu'un retard ne causerait aucun préjudice grave. En outre, il faut modifier la Loi de façon à habiliter le comité d'aide financière à accorder une aide aux intervenants qui sont parties à l'appel ou au recours en contrôle judiciaire.

RÈGLES SPÉCIALES POUR LES AUDIENCES COMPLEXES ET QUI DURENT LONGTEMPS. La nécessité se fait ressentir, à l'égard en particulier des audiences de la CEE et des commissions mixtes, de la formulation de règles spéciales à appliquer, le cas échéant, aux audiences complexes et qui durent longtemps. Comme les besoins des participants varient considérablement d'une audience à l'autre, il faut que l'application de ces règles soit laissée à l'appréciation discrétionnaire du comité d'aide financière. Certains détails à prévoir dans ces règles concernent l'aide financière dès les phases préparatoires du processus, l'échelonnement de l'aide, l'évaluation périodique de l'utilisation des fonds et de l'exécution des obligations envers d'autres intervenants et l'allocation périodique de dépens provisionnels.

# ACCESS AND IMPACT:

## PART 1: BACKGROUND AND CONTEXT OF THE IFPA

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## I. INTRODUCTION

Demands for access to administrative decision-making processes have grown with the rise in complex regulation and administration in Canadian governments since the Second World War. As the right to participate has been achieved, the realization that the effectiveness of participation is highly dependent on the resources available to the participant has also grown. Participation is necessary for reasons of fairness; it also makes for better decisions as broader information, values and opinions are canvassed by those required to make decisions in the "public interest". But these purposes cannot be achieved if the resources of participants are severely limited in relation to the case they are required to meet.

Provision of intervenor funding is a way to relieve against the chronically limited resources of "public interest" intervenors, making participation more effective. Intervenor funding can take many forms. The Ontario Intervenor Funding Project Act, 1988 ("IFPA") established a pilot project requiring proponents to provide funding to intervenors in proceedings before selected tribunals. This report is an evaluation of the IFPA pilot project during the course of its three years of operation, carried out on behalf of the Ontario Ministries of the Attorney General, Energy and Environment.

## A. Public Participation and the Challenge of Funding

The manner in which many administrative decisions were made in the 1960s and 1970s excluded members of the public, even though many decisions were required to be made in the "public interest". Too often, agencies and tribunals were only presented with the views of the regulated industry or the applicant for an approval. As agencies are now "faced with a bewildering array of social, economic and moral questions," a critical view is that excluding diverse interests is no longer appropriate.[1]

Increasing public access to administrative decision-making is important for several reasons:[2]

> Fairness. Decisions regulating the conduct of businesses affect small or large segments of the public. Sometimes individuals are financially affected, each to a small degree, as with telephone or utility rates; sometimes individuals' health and well-being are affected, as with environmental and food and drug regulation. In principle, if people are affected by decisions, they should have the right to be heard.[3]
>
> Quality of decisions. Where regulatory decisions affect the public and are required to be made in the "public interest", the quality of those decisions is improved when members of the affected public participate. They apprise the tribunal of facts that might not otherwise come to its attention; they assert different perspectives and opinions about the consequences of the decision to counter the assertions of the regulated industry. In this way the tribunal gains a better understanding of the range of dimensions of the "public interest" it is charged with serving. Better decisions result.
>
> Accountability. When members of the public participate in administrative decisions, they gain an understanding of the balance that is struck between competing interests in reaching a decision. This process improves the accountability of the decision-maker and legitimizes the decision for those who participated.

Recognizing a bare right to participate is often not enough to ensure that the goals of access are met. Participation must be meaningful. Often, in administrative proceedings, members of the public are challenging the proposal of public sector agencies or large private sector businesses with significant financial and human resources available for the professional presentation of their positions. As Macaulay claims, "there is a generally perceived imbalance of resources, information, expertise and familiarity with applications as between the applicant in a proceeding and the other components of the public interest."[4] Individuals and members of public interest groups generally have fewer resources to contribute. Where public interest groups represent the interests of consumers or other segments of the population, fund-raising results do not reflect the numbers who benefit from the group's work because individuals benefit from the group's work even if they do not contribute directly to the group. In addition, the costs of participating in an administrative process are much greater than the individual benefit would be of a successful intervention.

Accordingly, for participation to be meaningful in a proceeding where there is such an imbalance of resources requires attempts to redress that very imbalance. Assistance to intervenors, either by the tribunal or the proponent, is a common method of redressing the imbalance. Other ways of increasing public input include direct government consultation with interest groups or the creation of a public or consumer advocate to represent diverse interests in administrative proceedings.[5]

Recognition of the importance and necessity of improved access has moved governments to open administrative proceedings to many more participants. However, such openness does carry with it critical questions concerning limits and responsibilities, more specifically, when does open access unreasonably interfere with a proponent's rights?

This question of rational and equitable limits on access must be asked with respect to funding. As the then Attorney General said when introducing the IFPA in the Ontario Legislature, "The challenge in developing this legislation has been to balance the needs of the intervenor and the proponent, the body that has brought the matter before the board or which is the principal beneficiary of the issue before the board."[6] In the IFPA that balance was struck between the proponent being required to pay for intervenors in an amount determined in relation to the particular issues in each proceeding and the intervenors having to satisfy a number of criteria in order to qualify for funding and to be used to guide the amount awarded.

Moreover, these important goals of access operate in a much larger context. There are many other administrative proceedings, not included within the reach of the IFPA, on which these goals could be focused where important public policy is being worked out in the absence or with abbreviated participation of interests that will be affected. Even more broadly, these goals arise in areas outside the administrative context, such as the breadth and application of legal aid, class actions, intervention in court and questions of funding to raise Charter issues to name only a few. We have not been charged to look at these areas. We only observe that decisions made concerning IFPA could highlight, from other perspectives, how far-reaching this attempt to provide access in this more limited area has been and the difficulties of striking the necessary balance. In that sense, the IFPA can be a model for answering questions, in many other contexts, about the costs and benefits of intervention that is both effective and responsible.

## B. History and Background to IFPA

Sharing funds with public participants in administrative proceedings began in Canada through the exercise of costs awards by boards regulating gas and electricity rates. ("Costs" usually refers to compensation provided at the end of a hearing, reflecting the contribution made by the intervenor to the hearing.) The first board to award costs to intervenors was the Alberta Public Utilities Board, commencing in 1960. Most public utility boards in Canada have the power to award costs, but not all exercise that power.[7] Few other tribunals have this power.

The seminal exercise in advance funding in Canada was the

Mackenzie Valley Pipeline Inquiry, known more commonly as the Berger Commission. In 1974, Mr. Justice Thomas Berger of the British Columbia Supreme Court was appointed to head a federal inquiry into and report on the appropriate terms and conditions for proposals to build pipelines from Prudhoe Bay in Alaska to the Mackenzie Delta and down the Mackenzie Valley from the Delta through Yukon and the Northwest Territories to Alberta. The inquiry was to consider the social, environmental and economic impact of construction, operation and abandonment of the pipelines and Berger was authorized to hold hearings and summon witnesses.[8]

Early on, Berger determined that funding would be necessary to ensure that the many diverse interests would be represented at the hearings. Although the Order in Council appointing the Inquiry did not contemplate funding, Berger did have authority to adopt practices and procedures to properly carry out his mandate. Accordingly, he requested and obtained funding from the federal government which was distributed to Native organizations, environmental groups, northern municipalities and northern businesses

> to enable them to participate in the hearings on an equal footing (so far as that might be possible) with the pipeline companies -- to enable them to support, challenge, or seek to modify the project.

on the grounds that

> These groups are sometimes called public interest groups. They represent identifiable interests that should not be ignored, that, indeed, it is essential should be considered. They do not represent the public interest, but it is in the public interest that they should be heard.[9]

The Inquiry developed the following criteria for funding applicants: that they have a clearly ascertainable interest that ought to be represented at the Inquiry; that separate and adequate representation of that interest would make a necessary and substantial contribution; that applicants have an established record of concern for and a demonstrated commitment to the interest; that applicants do not have sufficient resources to adequately represent the interest; and that applicants have a clear proposal for use of the funds and be sufficiently well-organized to account for the funds.[10] $1.7 million in funds was awarded. In his report, Berger commented on the success of the funding exercise:

> The usefulness of the funding that was provided has been amply demonstrated. All concerned showed an awareness of the magnitude of the task. The funds supplied to the intervenors, although substantial, should be considered in the light of the estimated cost of the project itself, and of the funds expended by the pipeline companies in assembling their own evidence.[11]

The legacy of the Berger Commission is still powerful. Most importantly, the criteria for eligibility for funding used in subsequent funding programs, including the IFPA, are drawn directly from those used by the Berger Commission.

Following the Berger Inquiry, the Ontario government adopted the model for its Royal Commission on Electric Power Planning (1975 to 1980), the Royal Commission on the Northern Environment, and the Commission on the Regulatory Control of Mobile PCB Destruction Facilities in 1984.[12]

Although funding for public interest participants was gaining acceptance, the IFPA itself was precipitated by two decisions of the Ontario Divisional Court in 1985. One judgment quashed a decision of a joint board which had awarded costs in advance, payable by the proponent, to public interest intervenors under authority of its power to award "costs".[13] In Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee,[14] the Divisional Court held that the power to award costs had the same meaning at the joint board as it had in a court proceeding, that is, that costs are an indemnity for relevant expenses, "in favour of a successful or deserving litigant, payable by the loser" and determinable only at the conclusion of a proceeding. Costs are "not payable for the purpose of assuring participation in the proceedings."[15]

Central to this holding is the Court's assertion that the proceedings of courts and tribunals are sufficiently similar for such a holding to have relevance to a tribunal's task. The Court said:

> No doubt the nature of the proceeding before the Board differs in certain respects from that before a court, but each has its adversarial aspect and, in a real sense, it may be seen that there are winners and losers. Public hearings, such as here involved, generally have proponents and opponents.[16]

The Court went on to characterize what the Board had attempted as a provision of intervenor funding, "something which the Board has no jurisdiction to do. It is for the Legislature, in clear language, to so empower a board or tribunal, should it be found desirable as a matter of public policy."[17]

While this case was pending before the Court, the Ontario Energy Board stated a case to the Court asking whether the costs power in its enabling statute would allow the making of a regulation which had been proposed allowing the Board to provide "interim costs" to certain intervenors. The two cases were heard together and parallel decisions reached.[18]

Following these decisions, the new Liberal government in Ontario began providing funds in selective hearings through Orders in Council.[19] From 1985 until the IFPA was proclaimed in 1989, twelve Orders in Council made public funds available to intervenors in hearings before the Environmental Assessment Board, joint boards and the Ontario Energy Board.[20] Most of the Orders contained a set amount of funding that had to be divided among the intervenors according to criteria that directly mirrored those of the Berger Inquiry.[21] Some of the criticisms of this approach were that there was no certainty for intervenors as to whether there would be funding, the amounts were not considered sufficient for effective participation, the timing of the funding was not always appropriate, there were inconsistent funding decisions, lack of prescribed procedures and inconsistent direction for the use of funds and the nature of the process was political.[22]

Finally, on June 28, 1988 the Attorney General introduced Bill 174, the Intervenor Funding Project Act, 1988, on behalf of himself and the Ministers of Energy and Environment, to create a regularized system of intervenor funding at the EAB, joint boards and the OEB and to modify the costs powers of those boards. In introducing the bill, the Attorney General stated that his government

> has long advocated increased participation by the public in the justice system. This belief was reinforced, as least as far as I am concerned, at the Access to Civil Justice conference, which we recently hosted.... During the conference it was widely acknowledged that a regularized system for intervenor funding is an essential component of an accessible justice system.[23]

The government asked for public comment on the bill, following which it brought the bill forward for second reading in December 1988. The bill was referred to the Committee of the Whole for clause by clause review, amended and passed on December 15, 1988. The major amendments included adding both the right of intervenors to be awarded costs at the end of a hearing and an appeal provision.

The opposition parties generally supported the bill but criticized several specific provisions, in particular, that it was only a pilot project; that its application was too limited and should apply to the Ontario Municipal Board and the Auto

Insurance Board; that limiting legal fees to the legal aid rate would mean that intervenors could not obtain experienced counsel; and that the eligibility criterion of "established record of concern" might exclude legitimate groups recently formed to fight a proposal. Amendments were moved but not passed which reflected these criticisms. [24]

The government justified the concept of a limited pilot project on the grounds that the boards to which it applied were familiar with granting intervenor status, with intervenor funding and with costs awards. Because of this familiarity, they would be "best able to provide real feedback" on the project, to be used to "determine whether this model is appropriate for other boards."[25] The government justified limiting legal fees to the legal aid rate on the grounds that many government programs limit fees to the legal aid rate and that costs would be available at the end of the hearing and would not have any such limitation on the fees to be reimbursed. "[T]his program, and this particular section, draws a distinction between funding -- and that is prior to the matter being heard -- and the right and ability of those persons having intervenor status at the end of the matter to apply for costs."[26]

The Act came into force on April 1, 1989 to allow the boards time to amend their rules of procedure to accommodate the requirements of IFPA.

Since that time, an attempt has been made to extend the Act to proceedings of the Ontario Municipal Board through a private members' bill introduced into the Legislature by Robert Chiarelli of the Liberal party. This bill was first introduced in 1989, when it was supported by the NDP but on second reading was not referred to committee. It was reintroduced in December 1990 and again was not referred to committee.[27] The bill would include the OMB in the definition of "board" to which the IFPA applies and would expand the definition of "proponent" beyond those who are potentially major financial beneficiaries to any major beneficiary of an undertaking.

## C. Overview of the IFPA

The Intervenor Funding Project Act, 1988 came into force on April 1, 1989. The Act is comprised of two parts. Part I establishes a three-year pilot project to provide "intervenor funding" in proceedings before the Environmental Assessment Board, the Ontario Energy Board and joint boards considering matters under three environmental statutes. Part II of the Act amends statutes governing these boards as they relate to the power to award costs at the end of a proceeding and is not subject to the three-year time limit. The Act is reproduced in Appendix A.

The pilot project operates in the following manner. When a hearing before one of the boards is to be held, the hearing notices must refer to the right of intervenors to apply for funding. The board first determines who qualifies for intervenor status in the hearing and, at the OEB, holds an "issues day" to determine the issues that will be addressed in the main hearing. Then a funding panel, made up of one person drawn from the members of the board, or in the case of a joint board one person from each of the Environmental Assessment Board and the Ontario Municipal Board, is appointed to determine the funding issues.[28]

The first task of the funding panel is to name the "funding proponent", that is the party who will be required to pay the funding award. The funding proponent is usually the proponent in the substantive hearing.[29] The proponent can challenge its designation as funding proponent and the funding panel has the discretion to name no funding proponent.[30] The panel also has discretion to make no funding award or reduce an award where it would result in "significant financial hardship to the funding proponent".[31]

Once the funding proponent is named, the funding panel deals with the funding applications. The applications must be made in writing in accordance with standard forms.[32] The Act requires a hearing by the funding panel if the funding proponent objects to its designation as such, but appears not to require a funding hearing for determination of funding awards.[33] However, in practice, a funding hearing is held.

The Act spells out a number of criteria that intervenors must fulfil to be eligible for funding. First, funding may only be awarded in relation to certain issues, that is, those that both "affect a significant segment of the public" and "affect the public interest and not just private interests."[34] Secondly, there are criteria that relate to the nature of the intervenor which the panel must consider:

"whether,

> (a) the intervenor represents a clearly ascertainable interest that should be represented at the hearing;
>
> (b) separate and adequate representation of the interest would assist the board and contribute substantially to the hearing;
>
> (c) the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;
>
> (d) the intervenor has made reasonable efforts to raise funding from other sources;
>
> (e) the intervenor has an established record of concern for and commitment to the interest;
>
> (f) the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing;
>
> (g) the intervenor has a clear proposal for its use of any funds which might be awarded; and
>
> (h) the intervenor has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award." [35]

There are certain restrictions on the amounts that can be funded. In particular, legal fees must be assessed at the legal aid rate in effect on the date of the award[36] and disbursements are restricted to those for "consultants, expert witnesses, typing, printing, copying and transcripts necessary for the representation of the interest". These eligible disbursements can be expanded by regulation, but to date have not been.[37] The panel is required to set a ceiling on disbursements and to "deduct from the award funds that are reasonably available to the applicant from other sources."[38]

The funding panel can impose conditions on an award and it is a condition of every award that the funded intervenor

> allow the board under whose jurisdiction the award was made, or its agents, access to the books and records of the intervenor to insure that conditions set by the funding panel are being or have been met.[39]

If an intervenor does not "without reasonable cause" comply with the conditions of a funding award, the board may order a funded intervenor to "repay to the proponent the amount of the award, or such part thereof, as the board may order."[40]

Funded intervenors are eligible to apply for "supplementary funding". Application is not made to the funding panel but to the board hearing the case and can be made "at any time up to the end of the hearing".[41] The board can award supplementary funding if "it is of the opinion, having regard to all of the circumstances, that the original award was inadequate."[42] The board must also consider the criteria set out in s. 7 in making a supplementary funding award.[43]

An appeal lies, with respect to any "decision on intervenor funding", only on a matter of law by way of application to a single judge of the Ontario Court, General Division.[44] Two appeals have been launched of funding decisions, both with respect to the Ontario Hydro DSP Stage I funding decision. One, brought by the Independent Power Producers' Society of Ontario (IPPSO), was withdrawn. The other, brought by the Native Council of Canada (NCC), was heard by Desmarais, J. In his decision, dated October 19, 1990, the funding panel was ordered to rehear NCC's application.[45]

Part II of the IFPA, amends the acts of the three boards as they relate to the awarding of costs and the EAB is for the first time given the power to award costs. (Both the OEB and Joint Boards have had, and exercised, the power to award costs for several years.)[46] In addition, the Hamilton-Wentworth decision referred to above (section I.B.) is overruled for all three boards, which now are "not limited to the considerations that govern costs awards in any court" when awarding costs.[47] Any funding award received by an intervenor must be deducted from any costs awarded to the intervenor.[48]

Because Part II of IFPA is not subject to the three-year time limit that applies to Part I and does not, strictly speaking, address intervenor funding, a review of its operations was not part of our mandate. Costs are available to all intervenors in a hearing, whether funded or not, if they make a contribution to the hearing. The boards do not use need as a criterion for the awarding of costs. However, the interrelationship between IF and costs is very relevant for an evaluation of IF. We therefore have considered certain costs issues in our study.

### D. Context of IFPA

In order to fully understand the impacts of IFPA on intervenors and decisions, it is important to consider the context in which the Act operates. This includes a consideration of the proceedings to which IFPA applies and of other initiatives that may have a bearing on these proceedings in the future.

The IFPA applies to the proceedings of the Environmental Assessment Board ("EAB"), the Ontario Energy Board ("OEB") and joint boards ("JB") considering matters arising under the Environmental Assessment Act, the Environmental Protection Act or the Ontario Water Resources Act.[49] The EAB and OEB in particular have very different mandates which result in very different types of hearings. The IFPA's success at these boards may have as much to do with these different mandates as with the provisions of the IFPA itself.

The EAB is established pursuant to the provisions of the Environmental Assessment Act ("EAA"). Its jurisdiction is found in that Act, in the Environmental Protection Act and the Ontario Water Resources Act. Under the EAA, the Board holds a hearing where required and decides whether an environmental assessment document is "acceptable" and whether approval should be given to proceed with an undertaking.[50] The scope of inquiry under EAA is very broad because of the expansive definition of "environment" and the requirement that a proponent assess the impacts of all reasonable alternatives to the proposed undertaking. EAA hearings can be very protracted, particularly where approval is sought for a plan or program rather than a well-defined project, for example, the Class Environmental Assessment for Timber Management hearing which has been running since May 1988. Proponents under EAA are provincial ministries, agencies and Crown corporations and municipalities. Private sector proponents are only required to proceed under the Act if designated by regulation.[51]

The EAB also holds hearings with respect to waste management certificates of approval under Part V of the EPA and with respect to sewage works under the OWRA.[52] These hearings are generally much shorter and much less complex than those under the EAA.

The Ontario Energy Board is established under the Ontario Energy Board Act. It has a more limited regulatory jurisdiction than the EAB. For example, the OEB determines the rates that can be charged by the gas utilities on a yearly basis, and approves the construction of pipelines or gas storage facilities or changes in the ownership of the gas companies. On reference by the Minister of Energy, the OEB reviews and reports on Ontario Hydro's proposed rates, on a yearly basis, but does not set the rates. Much of the work of the OEB tends to be somewhat predictable, with the same parties as applicants and clearly defined interests participating every year.

Joint boards are established under the Consolidated Hearings Act where an undertaking requires hearings by more than one tribunal under a specific list of statutes, including the EAA, EPA, Expropriations Act, Municipal Act, Planning Act and others.[53] A joint board is established by the Chairs of the Ontario Municipal Board and the EAB together and is composed of "one or more members of either or both" of the OMB and EAB.[54] The joint board makes the decisions that would have been made by each board if the Consolidated Hearings Act did not apply. Joint Board hearings are often complex, lengthy hearings involving major developments. Examples of joint board hearings are the Ontario Waste Management Corporation hearing to establish a hazardous waste disposal facility, which began in November 1988, the Southwestern Ontario Hydro transmission corridor case, which ran for 131 hearing days, and the Region of Halton Landfill hearing (1986-1988).

A number of initiatives could have an impact on the context in which IFPA operates. These include the EA reform process, the work of the Commission on Planning and Development Reform in Ontario (the Sewell Commission), the Environmental Bill of Rights and the efforts to coordinate federal-provincial environmental assessment reviews.

The EA process itself is currently under review by the Ministry of the Environment, in part because of the length of time required for EAA approvals and the complexity and cost of hearings. After two years of discussion and consultation, the MOE released the EA Task Force's discussion paper, "Toward Improving the Environmental Assessment Program in Ontario", in December 1990. The Minister referred the report to the Environmental Assessment Advisory Committee ("EAAC") to conduct public consultation on it. Public meetings were held and written submissions solicited. The EAAC submitted its report and recommendations to the Minister on October 31, 1991. It remains a confidential document; however, Dr. Philip Byer, EAAC Chair, supplied us with copies of the submissions made to them which commented on the Task Force's recommendations respecting intervenor funding. These are dealt with in section VI below.

In parallel to the work of the Task Force, the EAB developed a discussion paper addressing proposals for change to the hearings process.[55] The EAB also made a submission to EAAC on the proposals in the Task Force's report.

It is not yet clear what changes will come about in the process as a result of these initiatives. However, the suggestions in the Task Force and EAB papers could have a direct effect on IFPA. Among the recommendations of the Task Force that are relevant here are those that would make a "planning and consultation" phase of EA mandatory. Included in this phase would be the requirement that a proponent give notice and develop an "assessment design document" setting out its plans for the proposed undertaking. At minimum, a public meeting would have to be held, but on request the EAB would hold a scoping session to define the parameters of the study that would be binding on the parties at any later hearing. The Task Force envisages a responsibility in the public as well as the proponent:

> The public and other parties have an obligation to educate themselves about the central facts and issues and to make their concerns known at the earliest opportunity.[56]

With respect to funding in this new mandatory phase, the Task Force recommends that proponents be "encouraged", not required, to provide participant funding. If funding is provided, it should be taken into account when funding for the hearing is being considered.[57]

The EAB's response to these recommendations is to support the early phase, including binding scoping hearings, only if a mandatory program for providing funding at the earliest stages is included. The Board also suggests that consideration be given to the establishment of an independent panel of experts to "provide independent and professional support for the intervenors."[58] Having access to funds and experts at the earliest stages will result in a "more balanced and effective EA process" and possibly a shortened government review and hearing.[59]

Two other aspects of the proposals for change that could have an impact on IF are the recommendations regarding joint federal-provincial reviews when both levels of government have EA jurisdiction and those regarding the need for special procedures for the application of EA to "plans and programs" such as the Ontario Hydro Demand/Supply Plan.[60]

The Sewell Commission was established in June 1991 to inquire into and report in two years on issues related to land-use planning in Ontario. The Commission's terms of reference require it to:

> examine the relationship between the public and private interests in land use and development;
>
> inquire into, report upon and make recommendations on legislative change or other actions or both, needed to restore confidence in the integrity of the land use planning system, ... and
>
> consult widely, undertake research, foster dialogue and make recommendations on amendments to the Planning Act, 1983 and other relevant legislation...[61]

One of the issues that will be addressed is how to better integrate environmental issues into the planning system while attempting at the same time to streamline the system.[62] The Commission also intends to deal with intervenor funding issues.

An Environmental Bill of Rights has been proposed by the government and is now the subject of a consultation process. Earlier versions of the bill included provisions for intervenor funding and it may be that the draft that emerges from the present consultation will address IF. Even if it does not, the

EBR will likely provide for expanded public participation in environmental approvals, abatement proceedings and regulation making, creating demands for IF to enable effective participation in those proceedings.

Finally, there are efforts being undertaken to bring about greater coordination between federal and provincial environmental review panels and boards in cases where both levels of government are involved. The pending Canadian Environmental Assessment Act contains provisions to enable federal participation in joint reviews. The EA Task Force makes some suggestions for amendments to the EAA to give Ontario authority to participate. One of the issues for joint processes that must be worked out is whether IFPA or the FEARO funding program should apply.

## NOTES TO SECTION I

1. R. W. Macaulay, Practice and Procedure Before Administrative Tribunals, (Toronto: Carswell, 1988), p. 26-3.

2. Reasons for increased public participation are considered by many authors. See, for example, Law Reform Commission of Canada, Public Participation in the Administrative Process, Administrative Law Series Study Paper (Ottawa: Supply and Services, 1979) at pp. 4-6; Raj Anand and Ian G. Scott, "Financing Public Participation in Environmental Decision-making," (1982), 60 C.B.R. 81, at pp. 87-96; and Bob Gibson, "The Value of Participation," in Environmental Management and Public Participation (Toronto: Canadian Environmental Law Research Foundation, 1975).

3. For a discussion of the right to participate in decisions affecting one's life, liberty or security as a guarantee in the Canadian Charter of Rights and Freedoms, see Martha Jackman, "Rights and Participation: The Use of the Charter to Supervise the Regulatory Process," (1991), 4 C.J.A.L.P. 23-56.

4. Macaulay, *supra*, p. 26-2.

5. Macaulay, *supra*, p. 26-4.

6. Statement of Ian Scott, Attorney General, Ontario Legislative Assembly, Debates, June 29, 1988, p. 4830.

7. See discussion in Janet Keeping, "Intervenors' Costs," (1990), 3 C.J.A.L.P. 81-90, and discussion in Part III A below.

8. Order in Council 1974-641.

9. Northern Frontier, Northern Homeland, Report of the Mackenzie Valley Pipeline Inquiry (Ottawa: Supply and Services, 1977), Vol. II, Appendix.

10. Northern Frontier, Northern Homeland, Appendix.

11. Northern Frontier, Northern Homeland, Appendix.

12. The Royal Commission on Electric Power Planning (the Porter Commission) is discussed in Liora Salter and Debra Slaco, Public Inquiries in Canada, Science Council of Canada Background Study 47 (Ottawa: Supply and Services, 1981), pp.79-97. On funding this report claims:

> The inquiry funded intervenor groups extensively. Some of the funding was allocated for research because the inquiry took the position that interest groups should be able to prepare their own research materials and be able to enlist experts. Interest groups were able, therefore, to prepare reports, hire staff, follow the progress of the hearings and maintain contact and information flow over the duration of the inquiry. Groups took their responsibilities as funded intervenors very seriously. Several comprehensive reports were prepared and the depth of the cross-examinations reflected the research done by the groups. Funding was applied for at the end of each year under certain formal criteria. (p.86)

13. In two prior cases, joint boards had been asked to order costs in advance, but had refused. In this case, the Joint Board concluded that it had the "jurisdiction to make an award of costs in advance of the hearing in circumstances where not to do so would effectively frustrate the hearing process itself." (Quoted by the Divisional Court, at 25.)

14. (1985), 51 O.R. (2d) 23 (Div. Ct.)

15. Re Hamilton-Wentworth, at 32.

16. Re Hamilton Wentworth, at 30-1.

17. Re Hamilton-Wentworth, at 43.

18. See Re Ontario Energy Board, (1985), 51 O.R. (2d) 333 (Div. Ct). The Court there stated:

> "What the Ontario Energy board here seeks to do is to grant funding, in advance of a hearing, to worthy intervenors and this is not encompassed by its power in s. 28. ...
>
> "If such jurisdiction is to be given to the Ontario Energy Board, it must be by legislation, and in amplification of the powers now held by the board under its creating and enabling statute. This, in my view, would require a consideration by

> legislative authority, of policy as to the desirability of such funding and, if desirable, the manner by which it would be accomplished. It is not for a board or tribunal to confer upon itself jurisdiction to fund intervention in advance, under the guise of 'costs'." (at 337)

19. Note the new Attorney General, Ian Scott, had been counsel to the Berger Commission and had acted for CELA and Energy Probe as intervenors in the Divisional Court cases.

20. The hearings were:

- 3M Canada, application for certificate of approval for an EFW plant in London; EAB 1985; $9,900 awarded.
- Tricil Limited, application for certificate of approval for landfill expansion in Sarnia; Joint Board 1985; $13,510 awarded.
- Consumers and Union Gas, applications for leave to construct pipelines and gas works in Township of Haldimand; OEB 1986; $36,000 awarded.
- Ministry of Transportation and Communication, EA of Highway 416; EAB 1986; $18,000 awarded.
- Halton Region, EA and application for Certificate of approval for landfill; Joint Board 1987; $30,000 awarded.
- Petro-Sun/SNC, application for EA and certificate of approval for an EFW plant in Brampton; Joint Board 1987; $30,000 awarded.
- Ontario Waste Management Corporation, application for EA and certificate of approval for hazardous waste treatment and disposal facility in West Lincoln; Joint Board 1988; $3,218,379 awarded.
- Ministry of Natural Resources, Class EA for timber management; EAB 1987; $300,000 awarded.
- North Simcoe Waste Management Association, Application for EA and certificate of approval for landfill in Tiny; Joint Board 1988; $30,000 awarded.
- Region of Peel, EA for Derry Road in Mississauga; EAB 1988; $30,000 awarded.
- Region of Peel, landfill proposal; Joint Board 1988; funding hearing adjoined pending changes to EA.
- Township of St. Vincent and Town of Meaford, application for certificate of approval for landfill; Joint Board 1989; $30,000 awarded.

21. In most instances, the amount allocated worked out to between $15,000 and $18,000 per intervenor. In the MNR Class EA for Timber, the allocated amount in the first Order in Council was $300,000. In the OWMC Order in Council, the funding panel was required to recommend the amount of funding that would be necessary, following a preliminary hearing. The amount recommended was $3,218,379.

22. Heather Campbell, Intervenor Funding and the Intervenor Funding Project Act in Ontario: A report prepared by the Canadian Environmental Defence Fund for the Ministry of the Environment Ontario, (May, 1991), pp.22-23.

23. Legislative Assembly of Ontario, Debates, June 29, 1988, p. 4830.

24. See, statements by Ruth Grier and Margaret Marland, Legislative Assembly, Debates, December 14 and 15, 1988, pp.6792-6805.

25. Statement of Steven Offer, Legislative Assembly, Debates, Dec. 14, 1988, p. 6797.

26. Offer, supra, Dec. 14, 1988, p. 6804.

27. See, Bill 85/89 and Ontario Legislative Assembly Debates, December 14, 1989, pp. 4842-4851; Bill 39/90 and Ontario Legislative Assembly Debates, April 18, 1991, pp. 795-801.

28. IFPA, section 3. Subsection 3(4) provides that "After determining all issues related to intervenor status, a board shall not proceed further with a hearing" until all funding applications are dealt with or the date for applying for funding has passed.

29. "Proponent" is defined in s. 1 to mean "a party whose undertaking, in the opinion of a funding panel, is the subject-matter of the hearing or another party or individual or corporation, who, in the opinion of the funding panel, is potentially a major financial beneficiary of the decision of the board."

30. IFPA, s. 6.

31. IFPA, s. 8(3).

32. Ontario Energy Board, Rules of Practice and Procedure under the Intervenor Funding Project Act, 1988, s. 4; Environmental Assessment Board and Joint Board Rules of Practice and Procedure under the Intervenor Funding Project Act, 1988, s. 5(2).

33. IFPA, s. 6(3).

34. IFPA, s. 7(1).

35. IFPA, s. 7(2).

36. IFPA, s. 7(3).

37. IFPA, s. 7(3) and (5).

38. IFPA, s. 7(3)(b) and 7(3)(c).

39. IFPA, ss. 7(4) and 9(1).

40. IFPA, s. 9(2).

41. IFPA, s. 12(1).

42. IFPA, s. 12(1).

43. IFPA, s. 12(2) provides that ss. 7 to 11 apply "with necessary modifications" to supplementary funding.

44. IFPA, s. 13(1).

45. Judgment of Desmarais, J., Ontario Court of Justice (General Division), Ottawa, October 19,1990. NCC had been denied funding and appealed on two grounds: that the panel had misapplied the funding criteria and that the panel had breached the rules of natural justice by relying on supplementary materials to which NCC had not had an opportunity to respond. The judge refused to substitute his findings for the Panel's on the issue of the criteria. In doing so, he said:

> Subsection 2 sets out several criteria which act as guidelines to the Panel when making a decision respecting intervenor funding. The list is not meant to be absolute in its application in that it should not be necessary for an

> applicant intervenor to meet all the criteria therein. The Panel must consider each of the criterion [sic] but where it is satisfied that the party has met a sufficient number of the criteria to warrant a grant of funding, then the applicant should not be denied because it has not met every count.

46. The OEB began awarding costs on a regular basis following a 1984 generic hearing which reviewed the issue, EBO 116. This decision sets out the considerations the OEB will apply in awarding costs. All intervenors are potentially eligible for costs, regardless of need.

47. IFPA, ss. 17, 18 and 20.

48. IFPA, s. 12(3).

49. IFPA, s. 1, definitions of "board" and "joint board".

50. Environmental Assessment Act, R.S.O. 1990, c.E.18, s.12(2).

51. EAA, s. 3(b). It is the policy of the Ministry of the Environment that private sector energy-from-waste plants using more than 100 t/d of waste will be designated. [March 1987 policy] Otherwise, designation is on a case-by-case basis.

52. Ontario Water Resources Act, R.S.O. 1990, c.O.40, s.7.

53. Consolidated Hearings Act, R.S.O. 1990, c. C.29, s.2.

54. Consolidated Hearings Act, s. 4(2) and 4(4).

55. EAB, The Hearing Process: Discussion Papers on Procedural and Legislative Change, September 1990. The Board asked for submissions and held roundtable sessions to discuss these proposals with interested persons.

56. Ministry of the Environment, Toward Improving the Environmental Assessment Program in Ontario (Dec. 1990) ("Task Force report"), p.9. Also see p.12.

57. Task Force report, recommendation 2.13, 2.14 and 2.15.

58. EAB, Recommendations on the EA Task Force Report, March 25, 1991, p. 7.

59. EAB, Recommendations, supra, p. 8. The Board also suggests consideration of other issues in

> "designing appropriate early intervenor support systems includ[ing]: the need for the public to have access to relevant expertise to protect their interests; the need to ensure that funding does not result in the total delegation of control of the process from the public to professional experts; the role the MOE and the EA co-ordinator should play in encouraging and facilitating public input to the process; the role that non-profit organizations can play in supporting intervenors; the rules that should govern the eligibility of corporations and other government levels to apply for intervenor support; the rules for applying acceptable intervenor support programs to small proponents and private sector proponents and mechanisms for formally incorporating early intervenor assistance as part of the proponent's planning costs."

60. See, in particular, the EAB's recommendations, pp. 23-24, discussing the need for a staged process for EA plan and program hearings.

61. Reproduced in New Planning News, Vol. 1, No. 1, Sept./Oct. 1991.

62. Comments of Commissioner Toby Vigod, New Planning News, supra, p. 2.

## II. GENERAL DISCUSSION OF THE PROJECT

### A. Purpose and Issues

The purpose of this project has been to evaluate the Intervenor Funding Project Act, 1988 as it has operated over the three years of the pilot project. We were charged with providing a "critical and comprehensive assessment" of the Act which would identify "strengths and weaknesses" and suggest changes to address any frailties.

We were asked to consider a number of specific issues, as follows:

1 - Effectiveness of the Act in meeting its objectives;
2 - Appropriateness of the funding criteria;
3 - Adequacy of the amounts of funding awarded and financial controls;
4 - Effect of limiting legal fees to the Legal Aid rates;
5 - Operation of supplementary funding mechanism;
6 - Appropriateness of "eligible disbursements";
7 - Relationship between funding and costs;
8 - Special needs of aboriginal groups;
9 - Special needs of minority groups;
10 - Experience of municipalities; and
11 - Implementation procedures.

The project commenced on September 30, 1991 and was completed in just over four months with a budget of $70,000. Because Part I of the IFPA is scheduled to expire on April 1, 1992, our deadline was very real. The task proved to be very large for the little time we had in which to complete it.

### B. Methodology

Our approach to the evaluation has been to generate both a quantitative and a qualitative review of the operations of the IFPA. The quantitative part of the evaluation involves a comparison of funding applications. The qualitative part of the evaluation considers the views of those with experience or an interest in the Act derived from written submissions and takes into account the interpretation of the Act as expressed in the written decisions of the Funding Panels and Boards applying the statute.

## i) Sources of Information for the Evaluation

### a) File Search

The quantitative evaluation was drawn primarily from a comprehensive review of the files of all funding applications that have occurred under the IFPA from coming into force on April 1, 1989 until December 15, 1991. The review was conducted using an instrument, which is attached as Appendix B to this report.

Files were searched and analyzed for details including the following:

- intervenors applying (successfully and unsuccessfully) for funding;
- identity of proponents;
- amounts requested and awarded;
- supplementary funding applications and their dispositions;
- costs awards and their relation to IF.

Such information and analysis were then checked against information appearing in the orders and reasons for decision of the boards. This was a lengthy and intricate part of the study.

### b) Submissions

In order to obtain the views of those who have experience under the IFPA or have an interest in it, an Issues Paper containing a series of questions was developed and sent on October 31st, along with a letter asking for submissions, to approximately 500 individuals and groups. (The Issues Paper was also available in French). The Request for Proposals that led to our engagement specifically highlighted possible aboriginal and minority needs, so a separate letter, enclosing the October 31 letter and the Issues Paper, was sent to 140 aboriginal groups.

(The Issues Paper and letters are attached as Appendix C). The mailing lists used were drawn from the files of the EAB and the OEB, from additional lists supplied by members of the Committee and from other information which came to our attention.

In mid-November, an advertisement advising of the conduct of the study and the availability of the Issues Paper and asking for written submissions was placed in 21 English and French newspapers and aboriginal publications (Appendix D). A press release was sent to an additional 385 community, aboriginal and ethnic newspapers and radio and television stations asking for coverage of the project.

The original material had requested submissions by December 1, admittedly a short time for replying. Many submissions were received by mid-December, but significant IFPA participants had not yet responded, including most aboriginal groups. In late December, phone calls were placed to every 10th name on the mailing list, of those who had not responded, and every 5th name on the aboriginal group mailing list. In early January, letters were sent to major institutional participants who had not yet responded.

Up to the end of January 1992, over 90 submissions were received. The list of submissions is found in Appendix E. Generally speaking, the calibre of the submissions is very high, with most making the effort to respond thoughtfully on these important issues. We are very grateful for these responses. Unfortunately, a few submissions were received so late that they could not be referred to fully. They have, however, been taken account of in formulating the recommendations. It is clear that very strong views are held on the topic of intervenor funding and the IFPA and that there is a range of opinion on a number of issues.

### c) Literature Search

As background for the study and the consideration of different funding models in other jurisdictions, a search of the literature was undertaken. In order to get more up-to-date information on other jurisdictions and to discover any evaluations of other models that may have been done, we wrote to a selected group of tribunals and agencies for information on their funding programs and followed up with telephone calls. Helpful information for that part of the study was derived from this effort.

d) Other Studies

Four other studies of the IFPA were available to us and were used extensively by us, in part for the information therein and in part for their value as a check on our work. The four studies are: Intervenor Funding and the Intervenor Funding Project Act in Ontario by Heather Campbell for the Canadian Environmental Defence Fund (1991), The Ontario Intervenor Funding Project Act, 1988: Its Review and Reform and A Model to Provide for Public Interest Participation in Regulatory Proceedings in Canada by Robert Horwood for the Public Interest Advocacy Centre (1991), An Evaluation of the Funding Denials under the Intervenor Funding Project Act, 1988 by Lorraine Huinink (1991) and Ontario's Intervenor Funding Project Act: The Experience of the Ontario Energy Board by Susan J. McWilliams (1991).

e) Interviews

Throughout the project, we have emphasized the importance of written submissions as the primary means of receiving useful comment on IFPA and the issues surrounding it. This was in part because we wanted to have attributable statements to which others could have access through this Report and in part because we wanted as much justification for respondents' positions as possible. Our emphasis on written responses and the unexpectedly large numbers of submissions meant that we did not rely on interviews to gather comment. We did, however, conduct a number of interviews (many by telephone), primarily for assistance in conducting the study and to respond to inquiries. The names of those who assisted us appear in Appendix F. We are very grateful for their cooperation.

### ii) Limitations on Research

While we have carried out our task as assigned, there were some constraints on us that affected the conduct of the study and our recommendations. In particular, limited time and resources constrained our ability to conduct broad consultation on the IFPA and affected the responses received. While many people made an extra effort to respond within our deadlines, many others told us they were unable to do so. Of particular concern to us is the lack of response from aboriginal groups, some of whom expressed their frustration with the very short time within which they were asked to respond.

## III. EXPERIENCE IN OTHER JURISDICTIONS AND WITH OTHER MODELS

### A. Introduction

The IFPA in Ontario has created a particular model for providing assistance to participants in a number of administrative proceedings. As a model, it is unique. While this study is primarily concerned with the IFPA, as part of our assessment we reviewed the experience in other jurisdictions with other funding models to provide context for our assessment.

Funding programs that have been identified can be grouped for discussion purposes into a number of categories:

- direct funding of intervenors by proponents;
- direct funding by government;
- indirect funding by government; and
- "private" funding.

Although useful for context, a discussion of these other models has limited utility because few have undergone assessment to gauge how they actually function and what their impact has been. Nevertheless, such a discussion does map the field of choice.

### B. Direct Funding of Intervenors by Proponents

#### i) Costs

The most common experience for proponents being required to fund intervenors in Canadian tribunals is through imposition of costs awards. Some Canadian tribunals are given the power to award costs in their enabling statutes and in fact most of the provisions are identical from board to board and jurisdiction to jurisdiction:

> "(1) The costs of and incidental to any proceeding before the Board are in the discretion of the Board, and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid, and by whom the same are to be taxed and allowed.

> (3) The Board may prescribe a scale under which such costs are to be taxed." [1]

These provisions are similar to the provisions applicable in court proceedings, from which the statutory language was drawn.

For many years, most boards having a costs power did not exercise it in favour of intervenors. The first to do so was the Alberta Public Utilities Board in 1960. Since then, other boards with the power have begun to award intervenors' costs, including the CRTC, Alberta Energy Resources Conservation Board, the Ontario Energy Board and the Manitoba Public Utilities Board. However, in two cases, boards have pulled back from awarding costs because of the increasing expense for the customers of the utilities.

Since 1975, the Alberta PUB has shown less willingness to award costs largely due to costs that have been "escalating dramatically" in recent years. Because these costs are passed on to utility customers, the Board "sees itself as having an obligation to the public to ensure that these costs are fair and reasonable."[2] The board's new guidelines limiting costs awards were challenged by intervenors but upheld.[3] In 1989, the Board adopted a schedule of fees and disbursements that cap the amounts that will be awarded by the Board.

In British Columbia the Utilities Commission awarded intervenors' costs until its enabling statute was amended in 1984 to prohibit the practice. This was the result of cost-cutting measures by the B.C. government following one hearing in which $357,000 had been awarded to intervenors, most going to environmental and Native groups.[4]

Each of the boards has its own guidelines for awarding costs but all of them use the criterion of assistance to the board. The OEB applies the following criteria:

> Awards may be made to an intervenor who:
> (a) has or represents a substantial interest in the proceeding to the extent that the intervenor or those it represents will be affected beneficially or

adversely by the outcome;

(b) participates responsibly in the proceeding; and

(c) contributes to a better understanding of the issues by the Board.[5]

Only the Manitoba PUB and the CRTC consider financial need to be an important criterion for recovering costs at the end of a hearing. According to Keeping, the OEB expressly rejected that intervenors should demonstrate financial need to qualify for costs, but maintains it is a factor that will be taken into account.[6] Conversely, where interim or advance costs are awarded, need must always be demonstrated.[7]

Courts have generally been unwilling to interfere with tribunals' discretion in awarding costs.[8] However, where a board fetters its discretion by denying costs on the basis of a letter from a Minister, or wrongly interprets the meaning of "costs" to allow an award of interim costs, the courts will intervene.[9]

The more restrictive reading of these provisions has been that costs has the same meaning as court costs, that is, they follow the event and are an indemnity for actual costs expended. They are not to be used to encourage participation generally.[10] Other courts and most commentators have pointed out the distinct differences in the roles of courts and tribunals:[11]

> There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearing or public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.

The Economic Council of Canada has recommended that costs be used as one mechanism for funding public interest groups. It specifically recommended that "all statutory regulatory agencies formulate rules for awarding costs to public interest group intervenors and, where legislation does not allow such awards, that appropriate amendments be made."[12]

Costs available at the end of a hearing are some incentive for public interest intervenors to participate but clearly fall short of the incentive associated with funding up front. There are a few Canadian boards with the power to make advance orders for costs, which can operate similarly to IF. Two are discussed in this section, the Alberta Energy Resources Conservation Board (ERCB) and the Canadian Radio-television and Telecommunications Commission (CRTC).

(1) The ERCB. The Alberta ERCB is a tribunal with broad authority to supervise the energy industry in Alberta, including the power to approve new developments. Since 1978, the ERCB has made costs awards to "local intervenors" to reimburse them for their interventions at the Board.[13]

Section 31 of the Energy Resources Conservation Act defines a local intervenor as a person who has an interest in land which may be directly and adversely affected by a decision of the Board, excluding energy-related businesses. Local intervenors are usually awarded costs at the end of the hearing, payable by the proponent. However, the Act provides that the Board may

> make an advance of costs to a local intervener and it may direct any terms and conditions for the payment or repayment of the advance by any party to the proceeding that the Board considers appropriate.[14]

The criteria the Board considers for making an advance of costs are whether the person applying comes within the definition of a local intervenor, whether the advance is "necessary prior to the holding of the hearing", and whether the intervenor has "established a need at that time for financial assistance in the preparation and presentation" of the intervention.[15]

An advance of costs is paid by the Board itself to the intervenor but, because it remains a contingent award until the final costs award, the costs are usually ultimately paid by the proponent. The costs that are payable in such an award are those that are reasonable and directly and necessarily related to the hearing. The Board hearing the case decides what costs are reasonable and necessary in light of the circumstances of each case. The Board also stresses the need to be "economical" in the sense of needing to avoid duplication.[16] There are no express limits on what disbursements are eligible for repayment. ERCB costs awards appear relatively modest. The amounts have ranged from $100 for an unrepresented individual to $50,000 for a group represented by counsel.[17]

The ERCB has amended its costs regulation and guidelines twice in the past, but there has been no comprehensive audit of the program. The program is now under review with the expectation of some further "fine tuning" rather than major changes.[18] There is the potential that the Alberta Legislature will change the eligibility criteria for receiving costs to parallel the criteria for the newly created Natural Resources Conservation Board.[19] There an intervenor need only show a "potential direct effect" rather than needing an interest in land affected. This would greatly broaden the number of eligible intervenors to include those who seek to represent a larger public interest.

The costs program of the ERCB has been criticized primarily because of its very restrictive reading of the definition of "local intervenor." The present definition was adopted in 1981 to broaden the groups who would be eligible for funds, but the Board has adopted a narrow view that

> not only contradicts the clear legislative intent to broaden the grounds of qualification for intervener costs, but also subverts the very purpose and intent of the public-hearing process. It is forcing on the concerned public an unnecessary connection to a proprietary interest to front a more genuine environmental concern regarding the disposition of resources.[20]

Because of the limits on eligibility, funding at the ERCB does not operate to assist a broad range of public interest intervenors to gain access to the decision-making process.

(2) The CRTC. The CRTC is the only Canadian federal tribunal which awards costs to intervenors in its proceedings. Its authority to do so is found in s. 76 of the National Telecommunications Powers and Procedures Act, which contains the standard Canadian costs clause.[21] The Canadian Transport Commission (CTC) also derives authority from this statute but has consistently refused to award costs to intervenors.[22]

The CRTC applies the Telecommunications Rules of Procedure when awarding costs. These regulations detail the procedure and eligibility criteria for an award. To receive costs, an intervenor must have:

> (a) ... an interest in the outcome of the proceeding of such a nature that the intervenor or group or class of subscribers will receive a benefit or suffer a detriment as a result of the order or decision resulting from the proceeding;
>
> (b) ... participated in a responsible way; and
>
> (c) ... contributed to a better understanding of the issues by the Commission.[23]

According to one review of the CRTC, the primary focus of the Commission in practice in determining eligibility is on the contribution the intervenor makes, not on the degree to which the intervenor is representative of an interest.[24] However the CRTC also requires that an intervenor lack sufficient funds to enable it to participate. Thus, although need is not an express criterion in s 44 of the Rules, since 1978 the Commission has consistently

> exercised its [costs] discretion in favour of public interest groups that would otherwise lack sufficient funds to intervene, in order to meet the objective of obtaining informed participation in a public hearing.[25]

The CRTC will, therefore, not award costs to commercial enterprises.

The CRTC has established a regime of interim costs awards for "intervenors who lack sufficient funds to participate in a commission proceeding."[26] The jurisdiction to make interim costs awards comes from s.76 combined with s.60(2) which authorizes the making of interim orders. The Commission considered its jurisdiction to award interim costs in doubt following the Federal Court of Appeal Decision in Bell Canada v. CRTC,[27] which had dealt with its powers to make interim orders generally. Based on that decision, it refused to award interim costs in a 1987 case and no further applications for interim costs were made until 1991. In 1991, the Commission received applications for interim costs from two groups - from the B.C. Old Age Pensioners Organization and other seniors' groups and from the National Anti-Poverty Organization and Rural Dignity Canada - in a case involving Unitel Communications. Following argument, the Commission decided it did have jurisdiction to award interim costs. This decision is based on the Supreme Court of Canada's decision in Bell Canada, which reversed the decision of the Federal Court of Appeal.[28] In addition, the Commission decided that the Hamilton-Wentworth case creates a prohibition on tribunals using their costs powers to award intervenor funding and not a prohibition on interim costs awards. The difference is that intervenor funding is based primarily on financial need and interim costs are based primarily on merit. The Commission went on to award interim costs to the two groups.[29]

The Regulations allow for the awarding of "interim" costs to intervenors who meet the three criteria above and who "can satisfy the Commission that [they] do not have sufficient financial resources available to participate effectively in the proceeding" without an interim award.[30] As an interim award, these costs are accounted for in the final costs award and are therefore potentially repayable. Any intervenor awarded interim costs is required to apply for costs at the end of the proceeding and must file documentation that the undertakings were fulfilled and an explanation for any difference between the interim award and the request for final costs.[31] Costs, whether final or interim, are paid by the regulated company which is the subject of the hearing. The only limit on eligible costs are that they not "exceed those necessarily and reasonably incurred by the intervener in connection with its intervention."[32] A costs award (whether final or interim) occurs in two stages: first the order setting out the terms and scope of the award and second, taxation of the bill of costs submitted.[33]

There has been no comprehensive review of the CRTC's costs program but several commentators have looked at its operations. According to Engelhart and Trebilcock, in a review a decade ago, the CRTC improved public access to rate hearings in particular through use of its costs power. From their research, they concluded that the CRTC was generally viewed as even handed in its treatment of applications because of its judicial approach and clear procedures.[34] Kane's view, also from the early 1980's, was that the CRTC through use of its costs power had been successful in increasing public participation in its proceedings. However, he noted that the process of applying for costs could be very time-consuming:

> As positive as this development may be, the awarding of costs to interveners is by no means a panacea for the financial difficulties confronting consumer groups. In this respect, for example, the time it has taken consumer groups to actually obtain money following an award of costs by the CRTC should be noted.[35]

The Commission recognizes that intervenors would "prefer a true intervenor funding regime, since such a scheme would eliminate the uncertainty that comes with merit-based awards. From the Commissions' perspective, a costs award regime requires that the Commission balance its desire to encourage informed public participation with the legal requirement, gleaned from the jurisprudence... that costs awards be based on the quality of interventions presented."[36] However, to the extent that "merit," in this context were judged as satisfied so long as there were responsible expenditure of awards there might be little difference, in fact, between "interim costs" and "intervenor funding."

### ii) Voluntary Awards by Proponents

From time to time, proponents who anticipate extended public hearings provide funds to expected intervenors prior to the hearing. These programs work to supplement other funding mechanisms, filling the gap where funds are needed but not allowable under the existing legislated procedures. Two examples are the Ontario Waste Management Corporation and the Essex-Windsor Waste Management Committee.

(a). Ontario Waste Management Corporation. OWMC is a Crown corporation created in 1981 to, among other things, build a hazardous waste collection, treatment and disposal facility.[37] During the course of its extensive site selection process, OWMC provided funds to potential public intervenors to assist them in the review of the proposal. In total, more than $2 million was provided from March 1985 to the end of December 1988. Most of this money went to the two municipalities (local and regional) where the preferred site was located. The primary purpose of the funds was for the review of the technical documents prepared by OWMC's consultants. However, the two municipalities were also funded for most of their costs associated with the project, including project staff, legal and experts' fees, seminars, advertising, travel, meals, supplies, office renovation costs and travel to Europe to view comparable facilities.

Funding has since been provided to these municipalities and an interest group under Orders in Council and under IFPA. This funding appears to have assisted the intervenors in reviewing the proposal as the proponent's documents became available, rather than having to wait for the hearing and IF. What is not clear is whether this funding had any impact on the hearing.

(b) Essex-Windsor Waste Management Committee. The EWWMC hopes that its provision of funds to anticipated intervenors will have an impact on the hearing by reducing the risk of delay at the start of the hearing while intervenors wait to start work on the technical documents until after they apply for funding under IFPA.[38] It is hoped that the funding will help intervenors in "assisting the Committee in the identification of issues and concerns and to working with the Committee in resolving them where possible."[39]

Under this program, the EWWMC has made available $250,000 which will be distributed by a funding panel from the Environmental Assessment Board. The eligibility criteria are the same as those under IFPA. The eligible disbursements are those in IFPA plus "such other expenditures which, in the opinion of the Funding Panel, are necessary for the representation of the interest."[40]

The reason for this funding program is a gap in the application of IFPA. The Essex-Windsor initiative has been taken because of the importance on the pre-hearing phase of the environmental assessment process in Ontario.

## C. Direct Funding by Government

Most of the experience with true intervenor funding in Canada has been with direct funding of intervenors by governments rather than proponents. Starting with the Berger Commission, most of this funding has occurred through programs established for one-time inquiries where the criteria and funds vary from case to case. Direct funding by government is also the model used in the United States, although this is done through a regularized process. In both situations, the funding is not accompanied by the power to award costs at the end of a proceeding payable by the proponent.

### i) Ad Hoc Funding

The Berger Commission was the first and most influential funding experiment in Canada. As described in the Introduction, the Inquiry was established in 1974 to review the social, cultural and environmental impact in northern Canada of proposals to build pipelines to bring natural gas to southern Canada. Berger creatively interpreted the provisions of his terms of reference to authorize funding for public interest intervenors and was able to secure funds from the federal government for this purpose. The amount of funds awarded to intervenors was approximately $1.7 million, out of a total cost for the inquiry of $4.8 million. The criteria established by this Inquiry were set out in the Introduction and have served as the basis for most funding exercises ever since.

Most commentators on the IF aspect of the Inquiry, including Berger himself, claim it had a significant impact on the outcome of the Inquiry. Criticisms of the funding program focus on the inadequacy of the funding, particularly for the one environmental group funded which nearly went bankrupt, and on the view that funding merely shifted the policy debate from south to north.[41]

Although it has been asserted that the federal government's commitment to public participation in northern development was at best ambivalent following Berger, numerous commissions and inquiries that followed relied on the Berger model of funding to increase public interest participation, including the Lysyk Inquiry (Alaska Highway Pipeline); the seven-year Ontario Royal Commission on the Northern Environment; the five-year Porter Commission on Electric Power Planning (Ontario); the 1977 Thompson Inquiry into West Coast Oil Ports; and the Ontario PCB Inquiry.

One example of how this model has been applied in a regulatory setting is with the federal Alachlor Review Board. In 1985, the federal Minister of Agriculture cancelled the registration of the pesticide alachlor under the Pest Control Products Act. Monsanto, the manufacturer of alachlor, required a review of this decision and a review board was formed. Because this case was very important with respect to certain aspects of pesticide regulation, the Minister of Agriculture ordered the review board to provide funds to intervenors in need of funds to participate.

The criteria for eligibility were determined by the review board and were based on the Berger criteria. Members of the Pest Management Advisory Board acted as an IF Committee, in order to attain a degree of independence from the board and the Minister. The original ceiling on available funds was $75,000 but $127,500 was eventually provided. These funds were used for legal and expert witness fees, travel and administrative overhead.

According to one member of the funding committee, there was "absolutely no doubt that intervenor funding was critical" to effective participation by the public interest intervenors.[42] Some criticisms of this particular process were that there were no guidelines for applicants and a 50% holdback was imposed which created problems for the intervenors. Court action was initiated at several points in the review but no funds were available for the intervenors for that purpose.

### ii) Regularized Funding by Governments

The longest standing regularized government funding programs for intervenors were those that operated in U.S. federal regulatory agencies primarily in the 1970's. One Canadian agency has recently moved out of ad hoc funding and into a regularized process. In Saskatchewan the Environmental Assessment Review Commission has called for the revival of "stakeholder funding." Saskatchewan had Canada's first statutory intervenor funding provisions (in its Environmental Assessment Act) but these were removed from that Act in 1988. The Commission's proposal for a new regularized funding process is expected to be acted on in early spring 1992.[43]

### a) FEARO

The Federal Environmental Assessment Review Office is the agency which administers the Environmental Assessment and Review

Process Guidelines Order, the federal EA program. Until recently, IF for intervenors in EARP public reviews has been supplied on an ad hoc basis by departments involved in the review.[44]

Concurrent with the development of the new Canadian Environmental Assessment Act, however, a more regularized process has been instituted. The program is not referred to in Bill C-13 but is an administrative program administered by FEARO. The program, initiated in 1991, has been allocated $8.5 million for distribution to intervenors over a six-year period.

Funds will be made available to cover the costs of preparation for and participation in the EA process. The funds will not be limited to the hearings stage of the process but will also be available for "phase I" activities which includes participation in the development of the guidelines document which forms the basis for the environmental impact statement.

Funding will be available to those who meet certain criteria. To be eligible, an intervenor must have a "demonstrated interest in the potential environmental effects of the proposal under review and the social effects directly related to those environmental effects", a need for financial assistance and must have made an attempt to coordinate with others "sharing like interests".[45] Priority for consideration will go to those whose "way of life or means of making a living will be directly affected by the project."

Eligible costs are those that are relevant to the panel's terms of reference and that are not duplicative of existing services or studies, including professional fees, research costs, travel expenses, purchase of documents, information collection and dissemination, office expenses etc.[46] FEARO actively discourages legal representation at panel reviews, so it will be interesting to see to what extent legal fees will be applied for and funded.[47]

The funding application will be made to an independent Funding Administration Committee which will make recommendations to the Executive Chair of FEARO, who will make the final decision. There is no appeal and costs awards cannot be made at the end of the review.

It is much too early to consider the likely impact on panel reviews of this funding mechanism. Where funding has occurred in the past, participation was enhanced, although the terms of reference of EARP panels and their lack of decision-making power limited the influence of these intervenors.

b) U.S. Federal

A model developed at the federal level in the United States during the 1970's whereby "compensation" for intervenors in rule-making hearings was provided by the agency conducting the rule-making. The best known example of this model was the Federal Trade Commission (FTC).[48]

The FTC establishes "trade regulation rules" or TRRs regulating the practices of a vast array of businesses. Since 1975, the FTC has had the power to provide compensation in hearings to establish these rules. Although still authorized in the legislation, compensation is no longer provided.

To be eligible for compensation, a person must have had or represented an interest which would not otherwise be adequately represented in the proceeding and which should be represented for a fair determination of the rule-making. Adequate representation was judged in relation to duplication of effort; for representation to be necessary, the rule must have significantly affected the interest of the intervenor. Similar interests could have been funded. In addition to these criteria, the person must have been unable to effectively participate because of financial inability. Business groups that were affected by the rule were eligible for 25% of the funds awarded. Because of criticism that compensation favours established Washington based groups, a ceiling was imposed, so that any one group could only receive $50,000 per proceeding, up to a maximum of $75,000 per year.[49]

Eligible expenses were those related to participation in the proceeding. There were some limits on the amounts to be paid lawyers and consultants and certain activities such as participation in judicial review were not compensable.[50]

The compensation decision was made by the Office of the General Counsel of the FTC prior to the start of the hearing. If needed, the funds were released before and during the hearing and supplementary funding was awarded.

A comprehensive review of the FTC's funding program was conducted by the Administrative Conference of the U.S. in 1979. The study countered the criticism from the business lobby that funding had favoured those who agree with the FTC's position, but found that 65% of the funds went to 8 consumer lobby groups. The review concluded that the compensation program had not increased the number of participants in FTC rule-making to include more grass-roots interventions, but had provided them with the ability to spend more on their interventions, putting them on a more even footing with the regulated industry.[51] Another criticism of the FTC scheme was the lack of independence of the funding decision maker from the FTC. Overall, however, the program was judged as a useful method of improving the fairness and effectiveness of the rule-making process.[52] However, despite these findings, the program was ended when funding was cut off following a hearing on children's television advertising in the early 1980's under the Reagan administration.[53]

### D. Indirect Public Funding

Governments provide assistance to intervenors to aid participation indirectly through a number of mechanisms. Three that will be discussed below are legal aid, a public advocate and a special fund. In addition, there are some avenues for providing partial assistance worth mentioning. One has been the provision of funds by federal departments to some public interest groups, which allow them to either carry on their daily activities or take part in proceedings of special interest. For example, the Department of Consumer and Corporate Affairs provided sustaining funding to the Public Interest Advocacy Centre and the Consumers' Association of Canada and has provided funds to the Consumers' Association and the National Anti-Poverty Organization to intervene in CRTC proceedings;[54] the Department of Indian Affairs and Northern Development provided funds to the Inuit Tapirisat of Canada to participate in a National Energy Board hearing; and Environment Canada provides limited sustaining funds to environmental groups.[55]

Another is the practice of some boards to make technical assistance available to intervenors. At the EAB, for example, the board has the power to hire experts to assist it.[56] The board has used this power, both on its own initiative and at the instance of intervenors who could not afford to hire an expert, to retain experts to address issues in a hearing and assist intervenors.[57]

### i) Legal Aid

In Ontario, persons without sufficient financial resources can hire a lawyer who will be paid by the provincial Legal Aid Plan. If the lawyer is in private practice, application must be made to the Plan and, if the person is eligible, a certificate will be issued. In addition, community and specialty clinics have lawyers and community legal workers on staff to provide legal services to those who qualify. Specialty clinics of relevance to a discussion of public interest participation are the Canadian Environmental Law Association, the Toronto Workers' Health and Safety Clinic, the Advocacy Resource Centre for the Handicapped, and the Advocacy Centre for the Elderly.

In Ontario and other provinces, legal aid certificates have been used by groups in proceedings which address issues of public interest. For example, in a Joint Board hearing addressing the site selection for the new Halton Region landfill, Ontario Legal Aid funded half of the legal fees for one citizens' group; the other citizens' group participating was represented by CELA. Certificates have also been issued for groups participating in

EAB, Environmental Appeal Board and Ontario Municipal Board hearings.[58] These certificates have been important for allowing groups which fall outside the application of IFPA to participate in hearings or to supplement such funding. However, despite the important role legal aid can and has played in increasing access, the OLAP subcommittee which considers group applications recently recommended that group certificates no longer be issued in environmental cases largely due to the disproportionately high cost of such cases compared with the other cases coming before the subcommittee.[59] The subcommittee went on to recommend that a more appropriate funding mechanism for environmental cases would be to expand the IFPA to include cases before the Environmental Appeal Board.[60] Even this would leave a gap for court actions involving environmental issues for which Legal Aid may still be the only funding mechanism available.

### ii) Public Advocate

A different model for providing assistance to public intervenors is the establishment of an office of a public (or consumer) advocate that will carry out research and investigations, disseminate information and intervene in administrative proceedings as the representative of the general public interest or a special segment thereof, such as consumers or mental health patients, etc.

This model has had more of a history in the United States than in Canada. In the U.S., there is experience at the state level with such public advocacy. In New Jersey, for example a public advocate intervenes in public utility and environmental cases.[61] At the federal level, despite many prolonged attempts, no consumer advocacy office has been established. Although the model has been effective in some states,[62] one of the major criticisms with this model as it has operated in the U.S. is that the advocate's office determines its view of the public interest and does not represent particular groups, which may have conflicting views on what the "public interest" is. Thus, for potential intervenors, "their" case may be taken out of their hands.

The only Canadian experience with a public advocate of sorts is the Manitoba Legal Aid Services Society's Public Interest Law Centre. This department operates essentially as a specialized clinic representing groups who seek to raise "public interest" issues or bring a test. In addition, the centre undertakes law reform activities. Clients must qualify for legal aid and cases must raise an issue of public interest primarily affecting lower income Manitobans. Groups will often be required to contribute toward the costs, but individuals usually cannot. Although the Centre does not usually undertake environmental cases, it does intervene in public utility rates cases before the Manitoba PUB which has ruled that the Centre can recover costs in proceedings before it.[63]

### iii) Special Fund

Under the proposals for a Class Proceedings Act in Ontario, a special fund will be created to provide funds for disbursements to representative plaintiffs in class proceedings and to provide payments of costs awards to defendants who are successful against such plaintiffs. Legal fees will not be eligible for payment. The special fund will be endowed with $500,000 from the Law Foundation of Ontario. Eligibility for funds will be determined by a Class Proceedings Committee of the Law Society of Upper Canada after considering several factors, including the merits of the case; whether the plaintiff "has made reasonable efforts to raise funds from other sources", has a "clear and reasonable proposal for the use of any funds awarded" and has "appropriate financial controls"; and any other relevant matter.

The establishment of this fund is a companion to the new procedures for class actions. The stated purpose of the package is to improve access to justice. The fund has been called a "progressive means by which traditional financial barriers to this type of litigation can be lowered to permit representative plaintiffs to come forward.."[64] It is an important initiative but its visibility and efficacy remain, as yet, untested.

Another special program for funding special kinds of court actions is the Court Challenges Program under the Canadian Council on Social Development. Under this program, litigation by individuals and non-profit groups raising important issues relating to language rights and equality rights under the Charter of Rights can be assisted. The maximum funds available are $35,000 for each stage of the challenge.[65] This program fills an important, if somewhat narrow, gap in funding for public interest litigants.

### E. "Private" Funding

There are two groups in Canada whose objectives are to provide financial assistance for legal proceedings that advance particular social objectives. The Women's Legal Education and Action Fund (LEAF) provides financial and other assistance for cases that help achieve equality for women. The Canadian Environmental Defence Fund provides assistance for important cases raising issues of public interest in environmental protection. Both groups are non-governmental; they raise funds through a variety of ways, including seeking donations from individuals.

While these groups fill an important gap in public interest litigation, they are insufficiently funded to provide more than limited amounts for very specific purposes.

## NOTES TO SECTION III

1. Examples of boards with the power to award costs: Ontario Energy Board, Ontario Municipal Board, Ontario joint boards under the Consolidated Hearings Act, CRTC, Public Utilities boards in Alberta, Manitoba, Newfoundland, Quebec, Nova Scotia, Alberta Energy Resources Conservation Board. Others are mentioned in Ian A. Blue, "Costs and Intervenor Funding -- The National Energy board,", in N. Bankes and J.O. Saunders, *Public Disposition of Natural Resources* (Calgary: Canadian Institute of Resources Law, 1984), pp. 235-248; and in Andrew J. Roman, *Effective Advocacy Before Administrative Tribunals* (Toronto: Carswell, 1989)

2. See Alberta Public Utilities Board, Procedural Review Report, June 30, 1989, p.21 and pp. 20-31 generally.

3. See *Re Green, Michaels & Associates Ltd. and Public Utilities Board*, (1979), 94 DLR (3d) 641 (Alta. C.A.).

4. See discussion of this case in Robert W. Shorthouse, "The Demise of Public Funding," (1985), 43 The Advocate 601; and *Alkali Lake Indian Band V. Westcoast Transmission Co. Limited*, [1984] 4 W.W.R. 263 (B.C.C.A.).

5. OEB, EBO 116, p. 187, quoted in Janet Keeping, *Intervenors' Cost*, (1990), C.J.A.L.P. 81-90, p.89.

6. Keeping, footnote 5, *supra*, p.89.

7. See discussion of CRTC and ERCB below.

8. See *Bell Canada v. Consumers' Association of Canada*, (1986), 17 Admin. L.R. 205, (S.C.C.) *Re Green, Michaels & Associates*, *supra*; and *Newfoundland and Labrador Hydro v. Newfoundland and Labrador Federation of Municipalities*, (1979), 24 Nfld. & PEIR 317 (Nfld. C.A.).

9. See, *Alkali Lake Indian Band*, *supra*, and *Re Regional Municipality of Hamilton-Wentworth Save the Valley Committee, Inc.*, (1985), 51 O.R. (2d) 23 (Div. Ct.). In the Alkali Lake case, the Court overturned a ruling of the B.C. Utilities Commission refusing costs to the intervenor Band based on a letter from the Minister of Energy that costs awards should be discontinued because of the government's policies of "economy and restraint." The Court held that the commission had fettered its discretion and that there was no clear reason to refuse costs. The Court ordered that the Band's costs be paid. However, the Legislature amended the Utilities Commission Act to remove the Costs power just prior to the release of the Court's decision. The case involving an advance of costs is *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth save the Valley Committee*, (1985), 51 O.R. (2d) 23 (Div.

Ct.); See also Manitoba Society of Seniors v. Greater Winnipeg Gas Co., (1982), 18 Man.R. (2d) 440 (C.A.).

10. See especially, Re Hamilton-Wentworth, supra.

11. Re Green, Michaels & Associates, supra, pp. 655-6. Also, see R.W. Macaulay, Practice & Procedure Before Administrative Tribunal, (Toronto:Carswell, 1988) c. 27 and Larry Fox, Annotation to Bell Canada, supra, (1986), 17 Admin. L.R. 206-211.

12. Economic Council of Canada, Reforming Regulation (Ottawa: Supply and Services, 1981), pp. 134-5.

13. ERCB, Guidelines Respecting Application for Local Intervenors' Costs Awards (1988), p.1.

14. Energy Resources Conservation Act, R.S.A. 1980, c.E.11, s.31(6).

15. The Local Interveners' Costs Regulation, Alta. Reg. 517/82, s. 12(2).

16. ERCB, Guidelines, footnote 16, supra, Appendix A, guidelines.

17. ERCB, Guidelines, footnote 16, supra, p.5., $50,000 is considered an "exceptional" amount by ERCB standards.

18. Letter from John K. Moloney, Legal Department, ERCB, 17 Dec. 91.

19. Moloney letter, supra; Natural Resources Conservation Board Act, S.A. 1990, c.N.-5.5, s.10. Under this new Act, funding is available for intervenors who "are or may be directly affected by a reviewable project."

20. Linda F. Duncan, "Equal pay for work of equal value: a public interest perspective on intervener costs," in N. Bankes and J.O. Saunders, footnote 1, supra, pp. 249-255, at p. 252.

21. R.S.C. 1985, c.N.20, (National Transportation Act).

22. National Transportation Act, R.S.C. 1985, c.N.20. The CTC has refused to award costs since 1911. This policy was reviewed in a hearing held in 1975 but the recommendation was for the CTC not to

depart from its past practice. This is reviewed in Gregory Kane, Consumers and the Regulators: Intervention in the Federal Regulatory Process (Montreal: Institute for Research on Public Policy, 1980), pp. 106-7; and K. Engelhart and M. Trebilcock, Participation in the Regulatory Process (Economic Council of Canada, 1981); and Michael Trebilcock, "Regulators and the Consumer Interest: The Canadian Transport Commission's Costs Decision," (1977-78), 2 Canadian Business Law J. 101-113.

23. CRTC Telecommunications Rules of Procedure, SOR/79-554, ss. 44(1).

24. Engelhart and Trebilcock, footnote 22, supra, p. 85.

25. Re Maritime Tel & Tel Ltd, Novix et al. Application to Review and Vary Telecom Costs Order CRTC 91-3, Telecom letter Decision 91-6, 26 July 1991, p.4

26. Letter from Keith Spicer, Chair, CRTC, Feb. 6, 1992.

27. [1989] 1 F.C. 296 (CA).

28. [1989] 1 SCR 1722.

29. Re Unitel Communications Inc. & B.C. Rail Telecommunications/Lightel Inc. - Applications to provide Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues: Applications for Interim Costs, Telecom Costs Order CRTC 91-4, 22 April 1991.

30. CRTC Telecommunications Rules of Procedure, s. 45(1).

31. CRTC Telecommunications Rules of Procedure, s. 45(3) and (4).

32. CRTC Telecommunications Rules of Procedure, s. 44(6)(b).

33. Spicer letter, footnote 26, supra.

34. Engelhart and Trebilcock, footnote 22, supra, p. 84.

35. Kane, footnote 22, supra, p. 111.

36. Spicer letter, footnote 26, supra.

37. Ontario Waste Management Corp. Act, R.S.O. 1990, c.O.39, s.3.

38. Essex Windsor Waste Management Committe, Intervenor Funding Report, approved February 6, 1990.

39. Ontario, Order in Council 2667/90.

40. Ontario, Order in Council 2667/90.

41. See discussion in Robert Page, Northern Development: The Canadian Dilemma (Toronto: McClelland & Stewart, 1986); and Francois Bregha, "A Ten Year Muddle: The Northern Pipeline and Canadian Energy Policy," (Dec. 1979 - Jan. 1980), Canadian Forum 16-21.

42. Hajo Versteeg, "Intervenor Funding: the Alachlor Review Board Experience," (1990), 3 C.J.A.L.P. 91-101, p. 97.

43. See Environmental Challenges, The Report of the Saskatchewan Environmental Assessment Review Commission, (Regina: Saskatchewan Environment and Public Safety 1991), pp.49-52.

44. Telephone conversation with Ghislaine Kerry, FEARO, Feb 6, 1992.

45. Federal Environmental Assessment Review Office, Participant Funding Program (1991).

46. Ibid, p.2.

47. The panel review is required to be informal and non-judicial, but structured. See, EARP Guidelines Order SOR/84 -467.

48. Other agencies, including U.S. Environmental Protection Agency under TSCA, have a similar program. See Barry B. Boyer, "Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience," (1981), 70 Georgetown LJ:51.

49. See Boyer, ibid.

50. This is discussed in Engelhart and Trebilcock, footnote 22, supra.

51. See Boyer, footnote 48, supra.

52. See Engelhart and Trebilcock, footnote 22, supra, pp. 110-1.

53. Telephone conversation with William T. Golden, Assistant Deputy General Counsel, FTC, Feb. 6, 1992.

54. Keeping, footnote 5, supra, p. 84.

55. Both cited by Blue, footnote 1, supra, p. 239.

56. Ontario, Environmental Assessment Act, R.S.O. 1990, c.E. 18, s. 18(10).

57. See Robert B. Eisen, "Expert Opinion Evidence at Environmental Board Hearings," (1989), 3 C.E.L.R. (N.S.) 63.

58. Ontario Legal Aid Plan, Report Regarding Environmental Cases to the Legal Aid Committee by the Group Applications and Test Cases Subcommittee, Sept. 1991.

59. In contrast to Ontario, in Manitoba, legal aid to groups is expressly available only where the objective of the applicant group relates "to an issue of public interest including ... any consumer or environmental issue." (Legal Aid Services Society of Manitoba Act, RSM 1987, c. L-105 s. 4(2).

60. Ontario Legal Aid Plan, Subcommittee Report, footnote 58, supra.

61. The experience in New Jersey is reviewed by Engelhart and Trebilcock, supra, pp. 124-134. There the Department of the Public Advocate merges the existing public defender's office with a public advocate's office which acts partly as ombudsman and partly as public interest advocate. The office is staffed by lawyers who hire outside experts as needed.

62. Engelhart and Trebilcock, footnote 22, supra, p. 134.

63. Telephone conversation with Arne Peltz, Director, PILC, Feb. 10, 1992 and The Legal Aid Services Society of Manitoba, Annual Report of the Public Interest Law Centre, 1990-91, (1991).

64. Statement of Winninger, Ontario Legislative Debates, Nov. 18, 1991, p. 3506.

65. This program is discussed in Larry M. Fox, "Costs in Public Interest Litigation," (1989), 10 Advocates' Quarterly 385, at pp. 396-399.

## IV. DISCUSSION AND ANALYSIS OF FUNDING PANEL AND SUPPLEMENTARY FUNDING DECISIONS

Before turning to the quantitative and qualitative findings of this assessment, we look at the decisions of the Boards themselves regarding initial and supplementary funding. This will assist in understanding the issues with which the Boards had to deal in specific cases over the three year span of the Project. Further, the discussion should provide useful background, for those readers less familiar with the Boards, to Part II: Findings.

Funding Panels of the Ontario Energy Board, joint boards and the Environmental Assessment Board have convened to address intervenor funding in 22 cases. In addition, supplementary funding has been dealt with by main hearing panels in seven cases. In the course of these decisions the Panels and Boards have reflected on many aspects of the IFPA. While the file analysis reviews the elements of each case in detail regarding what has actually occurred, a review of the Boards' decisions reveals their attempts to form a coherent interpretation of the Act and also indicates some inconsistencies in interpretation.

Of the issues discussed in those decisions, the following are important for gaining an understanding of the Boards' interpretation of the statute and their role under it. These issues are discussed in the following sections.

- Purpose of the Act and general issues;
- Role of the funding panel in relation to the hearing board;
- Application process;
- Eligibility criteria generally;
- Specific eligibility criteria, including:
    - financial resources and contribution;
    - legal fees;
    - separate and adequate representation and duplication;
    - coalition building;
    - record of concern;
    - accountability and financial controls;
    - public v. private interests;

- Eligible disbursements;
- Supplementary funding;
- Holdback and Costs;
- Aboriginal participation; and
- Accountability of applicants.

## A. Purpose of the Act and General Issues

The purpose of Part I of the IFPA is found in section 2. It is

> .. to provide for the establishment and conduct of a pilot project related to the provision of intervenor funding in proceedings before boards.

Funding panels have observed that this provision does not define the purpose of providing intervenor funding. Instead, several have tried to set out their interpretation of the Act's purpose. One OEB Funding Panel, for example, stated that the purpose of the pilot project was to allow groups who have up until now been financially unable to do so to "participate in hearings in order to enhance the public interest and assist the Board in making decisions on a fully informed basis."[1] Similarly, another OEB Panel observed that intervenor funding is designed to "permit an intervenor to make a credible, significant and helpful intervention on behalf of that portion of the public interest which it represents."[2] Another purpose is to permit a "greater acceptance by ... intervenors of the Board's final determination as it may affect them."[3]

This interpretation is consistent between the Boards. For example, one EAB Panel expressed the belief that the Act implicitly recognizes that the decision-making processes of the Boards are enhanced by the contribution of public interest intervenors.[4] Funding is intended to provide eligible intervenors with the assurance at the outset of a proceeding that they can plan for an effective and efficient intervention and not have to wait for a costs award.[5]

One EAB Panel went somewhat further, asserting that, in its view, the purpose of the Act was to redress the economic imbalance between parties to a proceeding.[6] The intention of equalizing the resources of the parties has not been generally accepted, however.

For example, in the Union Gas Rates case, EBRO 470, counsel for an intervenor argued that the purpose of the Act was to provide full funding in advance in order to make the parties equal in fact as well as law. The OEB in the supplementary funding decision rejected this interpretation, saying that the Act's purpose was to "provide some advance funding to eligible public interest groups to enable them to participate in proceedings before the Board."[7] (emphasis added)

Another general issue dealt with by the Panels has been the question of onus. One OEB panel rejected the argument that doubts about funding should be resolved in favour of the funding applicant. Instead, the onus is on the applicant to establish its eligibility and resolve all serious doubts about its application.[8]

A final general issue is determining the appropriate level of funding. Clearly, scope and complexity of the case to be advanced is an important factor. In the Ontario Hydro DSP hearing, the Funding Panel sought to apply the principle of treating intervenors with similar caseloads consistently. The Panel took into account a number of factors in attempting to do this, including:

> the scope of the intervenor's proposed intervention; the range of the funded experts; the geographic distribution and complexity of the constituent interests represented by the intervenor; the extent to which the intervenor has chosen to rely heavily on its case manager; any research assistance specifically funded or built into work plans; the extent to which the work plans provide assistance in assessing the likely preparation and hearing time; and the extent to which co-ordinator time is approved. This is not an exact science but a forecast.[9]

## B. Role of the Funding Panel in Relation to the Hearing Board

The role of the Funding Panel is to decide which intervenors are eligible for funding and what amounts of funding are reasonably necessary for an eligible intervenor to make its case. To play that role, the Funding Panel must assess applications for funding in relation to the scope of the hearing taking place. With the OEB, this task is made immeasurably easier because the funding hearing takes place after the main hearing panel holds an "issues day" where the issues that will be covered in the hearing are agreed upon and placed on an "issues list". This list is used by the Funding Panel to determine what issues are eligible for funding.

However, this does not happen at the EAB. Instead, the Funding Panel is required to make a preliminary determination of the relevant issues and test them against the eligibility criteria.[10] One panel has expressed the concern that this may lead to funding of a broader range of issues than if the hearing Board were to determine relevance before the Funding Panel determines eligibility for funding.[11] In several instances, relevance could not be determined on the basis of information before the Funding Panel and funding was deferred until the hearing Board could make a determination of relevance.

This concern has arisen because of the EAB's interpretation of s. 3(4) of the Act, to the effect that the hearing Board cannot decide any questions other than intervenor status, including questions related to relevant issues, scope of the hearing or jurisdiction, until the Funding Panel has determined the issue of funding. The Funding Panel in the Ontario Hydro DSP case recommended that the IFPA be amended to make it clear that the hearing Board should establish the issues, scope of the inquiry and general format of the hearing before applications for intervenor funding are considered by a Funding Panel.[12]

Funding panels have commented on the separation of funding responsibility between panels and hearing boards who address applications for supplementary funding. The purpose of this has been speculated to be that once a hearing is underway, the hearing Board is more familiar with the issues and thus is in a better position to assess the reasonableness of an intervenor's expenditures to date and the intervenor's contribution to the hearing.[13] Another panel stated that the advantage of having funding panels deal with initial funding is that it allows a candid review of strategy and case comment in the absence of the Board that will be hearing the case.

## C. Application Process

The Funding Panel in the Ontario Hydro DSP made a number of comments regarding operations of the IFPA. There, the complexity of the hearing was believed to necessitate a two-stage funding process. The purpose of Stage I was to determine eligibility and to provide preliminary funding for intervenors to negotiate with others to form coalitions and reduce duplication and then to develop detailed work plans of their proposed interventions. Stage II was to fund the work plans for the proposed interventions.

According to the Panel, the role of proponents with respect to the applications is to be explicit and specific as to their concerns about the applications and to assist by telling the Panel what research and studies have already been done. This is necessary to help the Panel in being able to evaluate the applications.

Applicants themselves must set out in detail the issues the intervenor intends to represent and the work plan for the intervention. Clear and detailed proposals are essential for accountability and for assisting other intervenors. The Panel stated that a clear proposal is the principal means for the Panel to evaluate the appropriateness of the applications. Where there was insufficient detail in an application, the Panels have been unable to determine the merits of the applications and have denied funding. [14] Failure to provide enough evidence to permit a determination of an application has been called a failure to meet "even the least onerous burden of proof required by the rule of law."[15]

### D. Eligibility Criteria Generally

Funding Panels of both the OEB and EAB have addressed the issue of how to view the criteria as a whole. Both Boards have commented that the Act does not provide for any ranking of the criteria in terms of importance. Therefore, in view of both Boards, as a general rule all of the criteria should be met. For example, the OEB Panel in EBRO 462 stated that failure of an intervenor to meet any of the criteria would be a "serious shortcoming". However, an intervenor may still be eligible if there are "mitigating circumstances."[16]

In the Ontario Hydro DSP, the EAB Panel expressed the view that intervenors must satisfy each of the criteria in s. 7(2) but, in exceptional circumstances and having regard to the importance of the issues and the practical constraints on intervenors, this rule can be relaxed if strict adherence to it would defeat the purpose of the Act. The Panel stated that three of the criteria in s. 7(2) must be established by every intervenor, without exception: that there be a clearly ascertainable interest, that the intervenor must "represent" that interest and that the interest deserves separate and adequate representation at the hearing. An example of a criterion which could be waived without interfering with the purpose of the Act is the requirement for a record of concern. This would be difficult to establish for any newly formed group which could, nevertheless, fulfil the intent of that criterion, that is, to demonstrate a commitment to the interest.

This issue was dealt with in the judgment of Desmarais, J. on the appeal of the National Native Council's denial of eligibility by the Stage I Funding Panel. The Stage II Panel interpreted the judgment to mean that an intervenor need not meet every criterion. Funding should not be denied if all criteria are not met if a sufficient number are met to warrant a grant of funding.

Although not expressly prohibited from receiving funding in the Act, a political party was determined to be ineligible by the DSP Stage I Panel. The Panel decided that in principle proponents should not be required to fund political parties because they have chosen to advance their concerns through the political process. In another case, however, a branch of the same party was granted funding as part of a coalition opposing a proponent.[17]

## E. Specific Criteria

### i) Financial Resources and Contribution

Many Funding Panels have addressed this criterion in their decisions. There are several aspects to the question of resources. The questions the Panel must ask include whether the intervenor has sufficient financial resources and whether the intervenor has made efforts to raise funds from other sources. It then deducts from the funding award funds from other sources reasonably available.

Sufficiency of resources depends on the context of the particular hearing and the scope of the proposed intervention. This can be seen in the way municipalities have been treated. An OEB Panel has said that under normal circumstances, "a municipality should not be eligible for funding as it should have sufficient financial resources to enable it to adequately represent the interests of its inhabitants.."[18] However, small municipalities may not be able to generate sufficient funds for participation and, in the situation of a long and very complex hearing, even a major municipality with annual revenues of $240 million has received substantial funding.[19]

Funding Panels of both Boards generally support the need for a reasonable contribution by intervenors, where feasible. One OEB Panel emphasized that

> .. in the Board's view, the intervenor

> funding mechanism, as set forth in the Act, is not intended to be the first choice for funds. Rather, the Act, as indicated in section 7(2)(d), is clearly intended to assist intervenors who have exhausted other alternatives in their search for funds.[20]

There are several reasons given by Funding Panels for requiring a financial contribution from funded intervenors. A contribution is evidence of an intervenor's continuing commitment and good faith, it enhances an intervenor's responsibility over the expenditures it makes and it encourages a group's members to monitor the course of an intervention.[21] One OEB Panel stated that if funding is provided for 100% of costs in advance, "no intervenor will see the necessity of undertaking any form of fundraising at all and the intent of the Legislature as outlined in these criteria will never be met."[22] Partial funding creates a buffer between the advance funds and the ultimate costs award which keeps "all intervenors vigilant in their budgeting and relevant and realistic in their testimony."[23] However, this view must be balanced against the purpose of the Act. As one Panel stated:

> ... insofar as most public interest groups are concerned, these requisites should be given less importance than other requirements contained in the Act. The fact that the Act even exists implies that the difficulty of raising funds should not of itself be a bar to presenting an important and bona fide public interest concern to the Board.[24]

In the Ontario Hydro DSP funding hearing, the Panel made it clear that large, established public interest groups with regular contributors should be expected to contribute to their intervention, despite the difficulties with fund-raising for hearings. In that case, the contribution required of environmental groups was the same for each, without regard to their fund-raising ability, degree of participation, or relative request for funding.[25]

One OEB panel, in considering the eligibility of Energy Probe for funding, noted that the group appears regularly before the Board and therefore should anticipate the costs of hearings as a predictable budgetary expense. Although recognizing that sufficient funds were not available for this hearing, he hoped that staff in future "will cease to consider intervenor funding as the apparent first choice source of funds required to support anticipatable interventions."[26]

Where both private and public interests are being advanced, a greater contribution is generally required than where only a public interest is being advanced.[27] Contributions are important even when they will be passed along to the customers of an intervenor.[28]

The nature of the contribution has been considered by Panels. Contributions toward the salaries of in-house experts have been accepted as reasonable contributions but other contributions have not. In the DSP hearing, for example, the Funding Panel disallowed contributions toward the difference between the Legal Aid tariff and a lawyer's full fees, on the grounds that such an expense is not fundable under the Act. This view has not been consistently applied. In the OWMC supplementary funding decisions, Niagara Region's contribution, dedicated to legal fees, was allowed but was the subject of a strong dissent by one member of the Board.[29]

In the OWMC funding decision of August 1991, the Board required the intervenors to pay the first 10% of the costs of experts to review new documents. The Board believed this would encourage greater scrutiny of consultants' estimates and more competitive bidding for consultants' work and would constitute a contribution by the intervenors.

### ii) Legal Fees

Funding Panels have expressed their disagreement with the limit of legal fees at the Legal Aid rate. The Panel in OWMC under the Order in Council recommended to the government that the prevailing government rate for outside counsel be substituted for the Legal Aid tariff. This was not accepted and the tariff remains the limit in the IFPA. The Panel in the first hearing under the IFPA, the Essex County Landfill Expansion case, called such a limit "anomalous".

The grounds for objecting to use of the Legal Aid tariff are that it will limit the ability of intervenors to hire experienced counsel and that where the government is the source of funds for both a proponent and intervenors, it is only fair to place them on the same footing with respect to their counsel's remuneration. According to this argument, experienced counsel would not take on a client for a long and complex hearing where the fee could be insufficient to cover overhead. Experienced counsel would benefit the Board as well as the client.

However, the issue of limiting legal fees to the Legal Aid rate must be discussed in connection with the potential to be ultimately awarded costs, which are not so limited. (See discussion of costs, below).

### iii) Separate and Adequate Representation; Duplication

Funding Panels all strive to avoid duplication of the funded interests. The Joint Board (in the OWMC supplementary funding decision) has stated that the intention of the Act is clear: duplicative efforts are not to be funded. Avoiding duplication is seen as a way of controlling costs.[30] A major goal of the staging of the DSP Funding was to allow intervenors to pursue coalitions and reduce duplication in the full applications for funding. In practice, where there is duplication of witnesses or issues, funding is not given.[31]

The issue of duplication arises in a way at the OEB that does not happen at the EAB because of the existence of Board staff and the role they play in hearings. In OEB hearings, staff lawyers participate through the presentation of evidence and cross-examination of witnesses in order to raise issues of public interest. This obviously raises some questions of duplication with public interest intervenors. The OEB has stated that it expects intervenors seeking funding to "undertake extensive communication and co-operation with Board staff."[32] The Board disagreed with one intervenor's counsel's position that communication with Board staff would be inappropriate when his clients represent one segment of a gas company's customers and the staff would be representing all of the company's customers.[33] One way the Board has divided responsibilities between staff and funded intervenors is to have general issues dealt with by staff and specific issues of concern to particular groups dealt with by their representatives.[34]

The need for separate and adequate representation involves more than a consideration of possible duplication. The Panel should also consider the adequacy of the representation of important interests and decide whether separate representation is necessary to effectively advance the interests from different perspectives.[35] However, this latter consideration has not been canvassed in all cases. For example, in the Innisfil Landfill case, the Panel decided that separate legal representation was not necessary for the Town, the ratepayers coalition and the Conservation Authority because their interests were not in "conflict". The issue of different perspectives was not addressed. This contrasts with the Panel in the DSP Stage II decision which emphasized the importance of examining the perspective of the intervenor. The panel stated:

> The definition of 'interest' under section 7(2) involves an examination of the perspective of the intervenor and it will be seen from the decisions which follow that the panel has taken into account the perspectives of the intervenors in determining the interests which they are found to represent. This is a recognition of the fact that in a modern complex society, one person can be a member of many constituencies for differing purposes and from different perspectives.[36]

However, a different approach was seen in the OWMC hearing. In reflecting on the benefit of separate representation at the mid-point of the hearing, the Board on a supplementary funding application was clear that separate representation for the three funded intervenors had not benefitted the Board or contributed to the hearing. In the Board's estimation, the intervenors were presenting a single case through three counsel.[37]

### iv) Coalition Building

The criterion of making reasonable efforts to bring related interests together into an umbrella group is related to the discussion above on avoiding duplication. The purpose of requiring coalition building is to control the duplication of efforts and costs. In some cases, it will also provide an integrated approach to the evidence presented at the hearing.[38] In most cases, Panels insist on the effort to try to join forces; if a coalition cannot be built, it will not be forced. Panels have gone to great lengths to promote coalition building, particularly in the DSP hearing where so many intervenors applied for funds. There, counsel to the Funding Panel met with intervenors following the funding hearing in an effort to encourage "further consolidation, reduction of overlap, and the extension of existing coalitions."[39] This effort resulted in a reduction of funds requested from more than $60 million to $47 million. This Panel considered coalition building to be crucial to avoiding long delays in making funding decisions.[40]

However, in some situations, Funding Panels have effectively treated intervenors as a coalition against their wishes. For example, in the Innisfil case, discussed in the previous sub-section, an attempt by the intervenors to form a coalition failed. The Funding Panel, however, decided that there was no conflict between the interests of the different intervenors and thus no difference in their interests. It "assumed" the issues could be dealt with by one counsel, in this case counsel for the Town. In the Steetley Quarry case, the Funding Panel gave the lead to the Town for the presentation of evidence, in effect forcing a coalition on the citizen intervenors. In that case, it was argued by proponent's counsel that the intervenors had made no serious attempt to form a coalition; the Board was silent on that matter. In the Hydro Rates case, HR 19, the Panel funded only the well-established intervenors, with proven records before tribunals, to provide the lead intervention for all those within defined areas of interest.[41] The result was that one of those lead intervenors, the Consumers' Association, withdrew from the hearing.

**v) Record of Concern**

The requirement to show an established record of concern and commitment to the represented interest is intended to ensure that the intervenor's interest is genuine and that its commitment is altruistic, not primarily financial.[42] As the DSP Panel stated, this criterion can be used to "weed out consultants without clients", which was done in the DSP. Yet this is one criterion the Board is prepared to waive if a group is recently formed and commitment can otherwise be demonstrated. For example, in the Orillia case, a new group formed in order to intervene in that hearing was found eligible because it was spun off from an earlier group with a history of participating in waste management issues. Also, in the EBLO 234 case, the Panel treated the formation of a new group to respond to the application as evidence of commitment to the interest.[43]

A history with respect to a general issue may not be enough to ensure eligibility where there is a risk of duplication and there is another group intervening with commitment to issues regarding the specific project that is the subject of the hearing. This happened with Pollution Probe in the OWMC case, where the local environmental coalition was found eligible and Pollution Probe was not.

The intervenor must also be recognized as a voice for the interest it seeks to represent. Where a local and narrowly focused group attempted to represent a broader constituency, the OEB Panel preferred the larger, more representative group for funding.[44]

An established record of concern can work to help eligibility where other factors might be in doubt. For example, in the DSP Stage II decision, the long history of Energy Probe influenced the Panel to fund the group even though it held doubts about its financial responsibility, a matter discussed more fully later.

**vi) Accountability and Financial Controls**

Funding Panels have not denied funding to any intervenor because of lack of financial controls. However, with EAB Panels, where there has been doubt about an intervenor's accountability or financial controls, conditions have been imposed. For example, Panels have imposed a condition on awards that the intervenors account for all funds so that the Board can assess the reasonableness of all expenditures.

In the OWMC supplementary funding decision, the Board imposed this condition and issued the warning that any funds found to be unreasonably expended would be dealt with through the Board's costs powers. The Board there had serious concerns because the intervenors had not attempted to "live within" the original funding award and had treated the approved budgets as "essentially irrelevant". Supplementary funding should only be for unanticipated costs, the Board said, and approval of invoices submitted for payment to the Funding Panel did not constitute approval to disregard the limits of the original award. The Board asserted that it has jurisdiction to require intervenors to account for funds spent to date when they apply for supplementary funding, but did not require them to do so in that case.

However, in the Essex decision, the proponent's lawyer sought copies of invoices that would be submitted for payment in order to verify for itself the reasonableness of the expenditures. The Panel denied this request because this might reveal the intervenor's strategies and tactics to the proponent.[45]

### vii) Public v. Private Interests

The IFPA only permits funding for issues which affect a significant segment of the public and which affect the public interest and not just private interests.[46] However, funding can be given to intervenors who represent an interest which is private as well as public. Some panels have done so. For example, substantial funding was provided in the Ontario Hydro DSP Stage II decision to the Independent Power Producers' Society of Ontario (more than $2 million). IPPSO has also received funds in two OEB cases and been refused in one. The refusal, in HR 20, was on the grounds that IPPSO had sufficient resources to fund its participation, not on the grounds that it represented a private interest.[47]

Where the only interest being advanced by an intervenor is a private financial interest funding will be denied. This occurred, for example, for the Waterpower Association of Ontario in the Ontario Hydro DSP Stage I decision. The association, as an industrial association representing private financial interests, was intervening to support the application of the proponent in order to enhance its members' financial interests and was therefore denied IF.[48]

Where both public and private interests are being advanced, the difficulty is in separating the two for the purposes of funding one and not the other. For example, in the DSP Stage II decision, the Panel had asked IPPSO to estimate the difference in its anticipated participation if it was only advancing its private interests but admitted it could not quantify or segregate the difference given the scope of the proposed intervention and the assistance the Board and other intervenors would receive with IPPSO's participation.[49] The panel required a contribution of $50,000.

## F. Eligible Disbursements

EAB Funding Panels have commented on the definition of "eligible disbursements" in s. 7(5) of the Act. The three categories of funding in awards are legal fees, experts' and consultants' fees, and disbursements. Section 7(5) provides:

> In clause (3)(b), 'eligible disbursements' means disbursements for consultants, expert witnesses, typing, printing, copying and transcripts necessary for the representation of the interest and such other expenditures as may be named in the regulations made under this Part as eligible disbursements.

The one panel to comment extensively was the Panel in the DSP which asserted that the definition in the Act was too limited. Its limitation was particularly problematic with respect to administrative and travel costs. Travel for lawyers and consultants is treated by the Panels as part of their fees but travel for intervenor groups or coalition members is not fundable. This causes particular difficulty for Native groups which are geographically dispersed and need to meet to discuss and reach decisions on hearing related issues and which need to travel great distances to reach the site of the hearing, but it is also a problem for coalitions. Participation by members and staff remains at the expense of the group. In DSP Stage I decision, the Funding Panel recognized that these costs can be awarded as part of a costs award because groups' resources should not be undermined by participation in the hearing.[50] One way this provision has been mitigated is to treat elders and in-house staff as consultants or experts for the purposes of the hearing. This allows payment of both their time and their travel expenses.

Because of the limitations of this definition, the EAB asked the government to make a regulation under Part I giving funding panels authority to determine the eligibility of disbursements on the grounds of "reasonableness and relevance." This regulation was not made, but was recommended again in the DSP Stage II decision. The Panel stated:

> It may be argued that funding for some of the above-described purposes can be obtained by costs awards at the conclusion of the hearing. However, this panel believes that

> the intervenor funding program is meant to provide more than seed money. Eligible intervenors have to have the assurance, at the outset, that they can plan for an effective and efficient intervention and will have the financial resources required.[51]

## G. Supplementary Funding

Section 12 of the IFPA provides for supplementary funding:

> 12(1) An intervenor who has received intervenor funding may apply to the board at any time up to the end of the hearing for supplementary funding and the board may award the funding if it is of the opinion, having regard to all of the circumstances, that the original award was inadequate.

Supplementary funding is awarded by the main hearing panel during the course of the hearing, reviewing the same criteria as the funding panel in the original award (section 12(2) stipulates that ss 7-11 apply). In fact, because of the nature of supplementary funding and because the pilot project has only been ongoing for less then three years there have been comparatively few such decisions. The Boards consider this separation of initial and supplementary funding decisions as an indication by the Legislature that the hearing board is considered to be in the best position to assess the contribution of the intervenor to the hearing and the need for further funding.

The Boards have tried, when determining whether an original award is inadequate, to limit supplementary funding to circumstances that were unexpected at the time of, or that have changed since, the original funding award. For example, in the first OWMC supplementary funding decision, the Joint Board stated that the original award was intended to cover the entire hearing and that supplementary funding would only be approved where there were demonstrably unanticipated changes and only with respect to issues that were initially funded for that intervenor.[52] With both Boards, where an intervenor wants funding for issues for which it was not initially funded, it must apply for supplementary funding before funds are expended.[53]

In practice, supplementary funding has been seen to be necessary when the relevance of issues was uncertain at the time of the funding hearing,[54] when a proponent has changed its case by adding new issues, witnesses or reports,[55] or when a proponent's case has gone much longer than expected.[56]

In justifying its need for supplementary funding, an intervenor must specify what circumstances were unanticipated at the time of the funding hearing and what work was required to deal with those circumstances. According to the Board in the OWMC case, it has the authority to assess the intervenor's contribution to the hearing as well as the reasonableness of its expenditures to date.

Supplementary funding is not intended to operate as a route of appeal of a funding panel decision. This issue has arisen in two cases where applications for supplementary funding were made shortly following decisions of funding panels denying the applicants their desired level of funding. In the Steetley Quarry case before the EAB, the citizens' group G.A.S.P. was awarded no funds for experts on the rationale that the Town of Flamborough would adequately deal with the areas of concern to G.A.S.P. Within two weeks of the funding panel's decision, counsel for G.A.S.P. filed an application for " additional funding to supplement an inadequate funding award pursuant to Section 12" of IFPA with the board.[57] The Board responded to the application in this way:[58]

> The Board believes that the supplementary funding application is premature. It is their position that you are essentially seeking an appeal of the funding panel's decision, and the legislation does not provide for an appeal except on a question of law. Although subsection 12(1) provides that a supplementary funding award may be made, there have been no changes in circumstances since the funding panel award, nor has the hearing commenced and proceeded to an extent that the Board could decide that supplementary funding is necessary. Also, the interests of the Town of Flamborough and your group have not in fact diverged.

> The Board's interpretation of the separation of the roles of the funding panel and the hearing panel in the Intervenor Funding Project Act is that the hearing panel is not intended to influence the type and quantity of evidence which will be heard before it. That principle would be rendered meaningless if the hearing panel were to hear reapplications submitted by Greensville Against Serious Pollution (G.A.S.P.) at this time.

The second instance of an early application for supplementary funding occurred in the Innisfil Landfill case before a Joint Board. There, a ratepayers' coalition and Lake Simcoe Region Conservation Authority were awarded no funds for experts and only limited legal fees. The panel assumed that the interests of these intervenors and the Town of Innisfil were the same and that "the issues relevant to all of the intervenors, except for Mr. Gooch, can be dealt with by counsel acting on behalf of the Town"[59] At the preliminary hearing before the hearing board two weeks later, counsel for these two intervenors brought a motion requesting the Board to convene a supplementary funding hearing. The proponent's counsel opposed the motion on the grounds that circumstances had not changed since the funding panel's decision and that to hear the application at this stage would amount to an appeal of the funding decision. The Board rejected that position and agreed to convene a supplementary funding hearing. The Board stated that, unlike the Steetley Quarry case, circumstances here had changed because counsel for the Town had submitted before the Board that "he cannot and will not fulfil the Funding Panel's expectation that he also represent the interests of the Coalition and the Conservation Authority"[60] Town counsel had stated that he was being placed in an "untenable" position trying to represent the interests of three parties with distinct interests. The Board believed that to deny the motion

> ...would be unfair to the affected parties, particularly since they appear to represent clear and ascertainable interests relating to issues of broad public interest. However, this ruling should not be misconstrued as opening

> the door for the appeal of Funding Panel Decisions through the guise of Supplementary Funding Applications to the hearing board.[61]

The Board looked at the funding allocations and decided that the initial award to the Town may contain a surplus of funds for legal counsel. It went on to direct

> ...the parties [to] pursue and present creative opportunities for utilizing the existing overall quantum of intervenor funding to allow the hearing to proceed with an appropriate level of participation by the Coalition and the Conservation Authority. If the Town is able to negotiate a sharing of the funding allocation at this juncture, its needs will be considered in any future supplementary funding applications and at the time of the consideration of costs.[62]

## H. Holdback and Costs

The Act provides that intervenor funding awards are to be deducted from any costs awarded to the intervenor.[63] In this way, presumably, an intervenor will not be double-funded.

The most important test applied to an intervenor on a costs application is whether it contributed to a better understanding of the issues before the Board.[64] Many expenses of intervenors that are not eligible for funding under IFPA are fundable under costs awards. This includes legal fees above the Legal Aid rate and disbursements other than "eligible disbursements".

As the practice has evolved, a difficulty has developed over what to do if a funded intervenor is awarded costs in an amount that is less than the amount initially funded. (Obviously, if costs are greater, there is no problem.) The two Boards have approached the problem quite differently.

The first EAB Panel, in the Essex County Landfill case, was the first panel to address the concern. It imposed a 15% holdback on the funding award. In the event the costs award was more than the funded amount minus the holdback (but less than the full funded amount), the proponent would pay the excess out of the holdback up to the amount of the original award. If the costs award was less than the funded amount minus the holdback, the proponent would retain the full 15% holdback. Thus, the intervenor was assured of at least 85% of the award. However, all other EAB Panels have treated the full funding award paid as a minimum, that is, the intervenor is assured that whatever happens with costs, it will have at least the funded amount to apply to its costs of intervention.

The OEB has consistently taken the position that a funding award is never assured. Its Panels' decisions provide that if the costs award is less than the funding award, the difference should be repaid to the proponent.[65] This approach creates much uncertainty for funded intervenors and makes intervenor funding ultimately contingent on an intervenor's contribution at the hearing as judged by the hearing panel that will award costs.

## I. Aboriginal Participation

The special needs of aboriginal intervenors have been canvassed in only one Funding Panel decision under IFPA, that is, the Ontario Hydro DSP. Furthermore, there has been aboriginal participation in only one other hearing held under the IFPA, the recent OEB decision into Intergrated Resource Planning on gas distribution systems.

Because of the sweeping scope of the planned hearing, aboriginal groups from all parts of Ontario representing many different cultures sought to participate. The Funding Panel recognized the need to have separate representation of different regional and cultural concerns and perspectives while at the same time encouraging coalition building. The Funding Panel also made it clear that aboriginal issues are most appropriately represented by the aboriginal groups themselves.[66] The result was funding for aboriginal interests of approximately $6 million of the $21.5 million awarded in Stage II.

One issue that was difficult to resolve within the IFPA was the funding of elders, who play an important role in decision-making in aboriginal bands and groups. The Funding Panel decided to treat elders as "in-house" experts, similar to its treatment of staff of some public interest groups. By treating them this way, the Panel was able to provide remuneration for their time and to fund their travel and accommodation costs. However, the Panel did not fund either elders or consultation within groups to the extent requested or community profiles of individual aboriginal communities.[67] No funding was allowed for elders in the OEB's IRP funding decision on the ground that they are " part of the organization and as such should contribute their knowledge gratis."[68]

## J. Accountability of Applicants

Applicants for intervenor funding have generally been very responsible in their funding applications and their use of funds. However, there has been at least one instance where the good faith of applicants have been called into question. The penalties available to funding panels are the power to deny funding or the power to order the repayment of funds when an intervenor has failed to comply with the conditions of an award. This latter power has never been exercised. One OEB panel awarded costs against an applicant for funding when the applicant provided no evidence to support his application and failed to appear at the funding hearing. The panel considered that the applicant had "abused the funding process" in a manner "which may bring the whole funding project into disrepute" and awarded costs against him in the "symbolic" amount of $1.[69]

One situation of particular concern occurred in the Ontario Hydro DSP case. There, Energy Probe filed an application at Stage II, having withdrawn from the Coalition of Environmental Groups, that asked for funds for a consultant who in fact earned substantially less as Energy Probe staff. The application was revised and resubmitted. The panel found that "Energy Probe's application was geared initially to provide a substantial source of revenue" for the group. Such an approach was "not acceptable" under IFPA:

> The transactions inherent to Energy Probe's application where the organization would earn excess revenues on its participation in the hearings are simply not acceptable. In addition, the fact that the approach taken and the excess funds to be received if the application was successful were not explicitly or implicitly referred to in the application raises the fundamental question in the panel's mind of the accountability and sense of responsibility held by this intervenor.
>
> The submissions made subsequent to the panel's enquiries, about the funding application as it relates to in-house staff, did not assuage the panel's apprehensions. In fact, it appears to the panel that the budget submitted on was inflated to justify the amounts requested in the first application. [70]

The panel could have denied funding for these reasons. However, it did find Energy Probe eligible for funding based on the group's "long history of representing the public interest in energy-related forums and believes that it could make a substantial contribution to the hearing."[71]

The actions of two other groups in the DSP hearing raise the issue of the failure to use funds for their intended purpose. At Stage I, these groups were funded for the purpose of developing their workplans for Stage II. However, at Stage II, they were both denied further funds because they had not used their Stage I funding to develop their plans. The Panel did not, on the face of the decision, contemplate requiring these groups to pay the Stage I funds back, but simply refused to give them more money.[72]

In some cases, the amounts of funds requested by intervenors have been considered unreasonably high. For example, in the Steetley Quarry decision, the Panel remarked that the requests of all applicants were "excessive" and in the OWMC supplementary funding decision, the joint board called the request for legal fees by one applicant "grossly unreasonable". The response of panels is to reduce the funds to within the reasonable range.

## NOTES TO SECTION IV

1. OEB, EBRO 462, Union Gas Rates, Oct. 29, 1989, para. 4.1

2. OEB, HR 19, Ontario Hydro Rates, May 10, 1990, para. 3.1.

3. OEB, EBRO 473, Consumers' Gas Rates, Sept. 23, 1991, para. 3.1.7.

4. EAB, EA-90-01, Ontario Hydro Demand/Supply Plan ("DSP") - Stage I, June 27, 1990, p.6.

5. EAB, DSP Stage II, Dec.14, 1990, p.17.

6. EAB, EP-89-02, Essex County Landfill, August 31, 1989, p.3.

7. OEB, EBRO 470, Supp. Funding decision, Feb.8, 1991, para. 1.5.5.

8. OEB, EBLO 234, Union Gas Leave to Construct, Nov.21, 1989, para. 4.3.

9. DSP II, supra, p. 26.

10. DSP, Stage I, supra, p. 8.

11. DSP, Stage II, supra, pp. 15-16.

12. DSP, Stage II, supra, p. 16.

13. Joint Board, CH-87-02, OWMC, Supplementary Funding Decision April 19 1991, p.10.

14. See for example, OEB, EBLO 239, Union Gas Sarnia Pool, Aug.22, 1991, para. 1.2.7.

15. EBLO 239, supra, para. 1.2.9.

16. EBRO 462, supra.

17. See, decision in EAB, EP-90-03,City of Orillia Landfill case, July 25, 1991, where the Orillia Greens were funded as part of a coalition.

18. OEB, EBRO 467, ICG Utilities Rates, Oct.12, 1990, para. 1.12.

19. Region of Niagara, in the OWMC funding decision.

20. OEB, EBRLG 35, British Gas Takeover of Consumers's Gas, June 12, 1990, para. 3.1.19.

21. See, for example, OWMC, Supplementary Funding, supra, p.25.

22. OEB, HR 19, supra, para. 3.4.

23. HR 19, supra, para. 3.5.

24. EBRO 473, supra, para. 3.1.17.

25. The Panel took the amount offered as contribution by Pollution Probe and applied it to other "similar" groups. However, Pollution Probe was awarded $328,180, while Energy Probe and the Coalition of Environmental Groups, both required to raise $30,000, were awarded $594,720 and $2,791,753 respectfully.

26. EBRLG 35, supra, para. 3.1.21.

27. See, for example, Joint Board, Innisfil Landfill, Nov.29, 1991, where the Town has a "vested interest" in the landfill, should contribute 50%.

28. In the Ontario Hydro DSP Stage II decision, the Municipal Electrical Association was required to contribute $100,000. The Panel knew the contribution would be passed along to MEA's customers, but considered that direct financial participation will

"encourage an ongoing interest and a monitoring of the process by the utility commissions that are members of MEA." (p. 128)

29. Joint Board, OWMC Supplementary Funding decision, June 1991.

30. DSP Stage I, supra, pp. 4-5.

31. See EAB, Kam Power Corporation EA, November 29, 1990, re Coalition; EAB, Steetley Quarry Waste Disposal Site, April 2, 1990 re Parish of St. Paul's and GASP; Joint Board, OWMC, Order in Council December 15, 1988, re Pollution Probe; DSP Stage I, supra, re Corridor Opposition Group, Ecosystem Approach Group, Native Council of Canada, Stewardship Advocacy Coalition of Ontario Churches.

32. EBRO 473, supra, para. 3.1.6.

33. EBRO 470, supra, 1.42.

34. OEB, EBRO 474, Centra Gas Ontario, Sept. 20, 1991, Ontario Coalition Against Poverty.

35. Ontario Hydro DSP, Stage I, p. 15.

36. Ontario Hydro DSP, Stage II, p. 13.

37. OWMC Supplementary Funding Decision, April 19, 1991. The three intervenors had objected to any consideration of the reasonableness of their expenditures to date and refused to provide the Board with this information. The board stated that in the absence of this information, it would comment on how the intervenors had run their cases to that point.

38. HR 19, supra, 3.11.

39. Ontario Hydro DSP, Stage II, p. 21.

40. Ontario Hydro DSP, Stage II, pp. 22-23. The Panel said: "The difference in the time required by the panel to assess and decide on applications which reflected successful negotiations for coalitions, integration of work by experts and reduction of duplication, in comparison to the time necessary to assess and

decide on applications which required the panel to thread its own way through that integration is significant. All intervenors and the proponent have a common interest in resolving funding issues as quickly as possible."

41. HR 19, supra, 3.10.

42. DSPI, supra, p.18.

43. EBLO 234, supra.

44. EBRO 473, para. 3.1.11.

45. Essex County Landfill, supra, p.7.

46. s. 7(1).

47. OEB, HR 18 Ontario Hydro Rates, May 9, 1989, HR 19 supra, HR 20 Ontario Hydro Rates, May 13, 1991. In HR 20, the Panel considered the question of public v. private interest by looking at IPPSO's membership. The Panel found that the membership was slowly moving further towards private interests, however, the issues raised did have the "minimum measure" of public interest required by IFPA.

48. DSP I, supra, re Waterpower Assn.

49. DSP II, supra, re IPPSO, p.111.

50. DSP I, p.23.

51. DSP II, p. 17.

52. OWMC Supplementary Funding, April 19, 1990, pp.17 and 28; also see EBRO 470.

53. EBRO 470, supra, para. 1.5.7.

54. See, for example, the DSP - if issues deemed relevant by the Board, apply for supp. funding; EBRO 474 - issues not on issues list, if Bd deems relevant, apply for supp. funding.

55. See, for example, OWMC.

56. See, for example, EBRO 470.

57. Letter from Peter Pickfield, Garrod Associates, to Jack Santos, Deputy Secretary, EAB, April 16, 1990.

58. Letter from Jack Santos, Assistant Board Secretary EAB, to Peter Pickfield, Garrod Associates, April 26, 1990.

59. Innisfil, p.3.

60. Joint Board, Innisfil, Ruling on Motion for a Supplementary Funding Hearing, December 23, 1991, p.6.

61. Innisfil Ruling p.7.

62. Innisfil Ruling, p.7.

63. IFPA, s. 12(3). Part II of the IFPA, which is not subject to the three year expiration, gives the power to award costs to the EAB and provides that the three boards are not limited to the considerations that govern awards of costs in any court, when awarding costs.

64. HR 18.

65. See, for example, HR 19, HR 18, EBRO 470.

66. See, DSP II, re Cultural Survival decision and Sierra Club, p.80.

67. See decisions for Moose River/James Bay Coalition, Nishnawbe Aski/Grand Council Treaty #3/Teme-Augama Anishnabai and Native Coalition.

68. OEB, E.B.O. 169, Integrated Resource Planning, Dec.20, 1991, para 3.10.

69. EBLO 239, supra, para. 2.0.1.

70. Ontario Hydro DSP, Stage II, pp. 90-91. See pp. 86-91 generally.

71. Ontario Hydro DSP, Stage II, p. 91.

72. See DSP Stage II decisions re HELP/Riverwatch (pp. 95-99) and Six Mile Lake Cottagers' Association (pp.186-187). There was no implication of bad faith or irresponsibility on the part of these groups.

# ACCESS AND IMPACT:
## PART 2: FINDINGS

## PART 2: FINDINGS:
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## V. DISCUSSION AND ANALYSIS OF FILE SEARCH

### A. Introduction

The "file search" consisted of systematically examining all cases in which there had been any applications for intervenor funding under IFPA. We did this to attempt to answer a series of questions about intervenor funding which we will discuss in detail momentarily. We conducted searches by asking our researchers to examine the files of the Environmental Assessment Board (EAB), the Ontario Energy Board (OEB) and the two cases of a Joint Board in which there has been intervenor funding under the Intervenor Funding Project Act, (Ontario Waste Management Corporation (OWMC) supplementary funding and Innisfil decisions.) In order to complete the study on time a cut-off date of December 15 was selected (In this regard see the Addendum at the end of this section).

Generating a set of statistics by carefully reviewing the relevant files is important. Such a review can provide an overall account of how the Act has functioned freed from any set of strongly held opinions. Participants in the process can be strongly influenced by one case, the complexities and controversies of which understandably rivets their attention. Even those involved in several cases may still experience only certain parts of the process. Finally, the Ontario Energy Board, the Environmental Assessment Board and the Joint Board are very different regarding some aspects of jurisdiction and structure of decision making; few participants in intervenor funding have been equally involved with all Boards.

The instrument used to examine each of those files appears as Appendix B. Our analysis is presented through a series of descriptions and tables which are presented next. The tables themselves are found at the end of this subsection (pp. 122 to 129). (For ease of presentation numbers are frequently rounded in the text; precise figures are presented in the tables.)

Our consulting agreement did not require us to conduct, nor did constraints of time and money permit, a thorough review of Order-in-Council funding, a method of supporting intervenors used prior to IFPA in the 1980's and described in more detail in the introductory parts of this Report (see I.B.). However, we will describe some findings regarding Order-in-Council funding later in this section. We will also refer to two funding hearings where this method of funding was used: Ministry of Natural Resources Timber Management Class Environmental Assessment (MNR) and the Ontario Waste Management Corporation (OWMC) since they raise issues regarding length and complexity which are related to another vast and difficult hearing, Ontario Hydro: Demand Supply Plan which is being funded under the IFPA and which is discussed in this section and a number of other places in this Report.

## B. Results of the File Search

Table 1, Overall Summary, presents the following information (proceeding down the left hand side of the table): the number of cases, the number of applicants for intervention and the number of applicants for funding.[1] The applicants for funding are subdivided between those who were successful and those who were unsuccessful with a breakdown of the amount requested in terms of the range (lowest/highest), the average, and the "median" (that is, there are as many figures above as there are below); in the case of successful applicants, the amounts awarded (again in terms of the range, the average and the median) are presented.

Table 1 proceeds to present the information just described in terms of a grand total. (Note: Table 1 does not include figures for Supplementary Funding. These are presented separately: see Tables 5 & 6 and sec. V.B.(vi)) However Table 1 then disaggregates the data between the Ontario Energy Board and the Environmental Assessment Board (Joint Board cases, the Ontario Waste Management Corporation (CH 87-02) and Innisfil (CH 91-01), are included with the Environmental Assessment Board figures). For reasons we will examine in a moment, a further division is made within the Environmental Assessment Board between the Ontario Hydro Demand/Supply Hearings and all other cases.

### i. Overall Results

Overall results are helpful in giving a broad depiction of the issues being examined. However, such results may miss important differences which appear only when the figures are disaggregated for boards, types of intervenors, applications for supplementary funding, and other matters which we will subsequently turn to in detail. This breakdown of the data will show that the most startling differences are not between the EAB and the OEB but, rather, between the Ontario Hydro-DSP and all other cases at the OEB and EAB. It is these differences that will explain the overall costs of intervenor funding, while exploring these differences will give a relatively complete account of what has taken place. In this sub-section, however, we report the overall results.

During the period examined, April 1, 1989 (the day the Act came into force) until December 15, 1991, (the cutoff date for searching all files) there were 22 cases in which there were applications for intervenor funding. In the 22 cases there were 518 applications for intervention (all successful). Of these 518 intervenors only 120, or 23%, applied for intervenor funding. Whatever the strengths and weaknesses of existing criteria for awarding intervenor funding they appear to have a differentiating effect since 77% of intervenors do not apply for funding, arguably, because the structure of the Act makes it clear that they would not qualify for such assistance.

Of the 120 applications for funding 71 were successful: an overall success rate of 59%. The grand total for money awarded to these 71 intervenors was approximately $25,000,000. Even at this general level there is some ambiguity. This is so because 28 of the 49 unsuccessful applicants were actually turned down on the merits of their funding applications, that is, a negative decision was reached by a panel. Of the rest, 21 were unsuccessful in the sense that they filed their applications too late, withdrew their applications or did not fill out the proper application. Depending on whether the 21 unsuccessful applicants are included the rejection rate can be said to be either 41% (49/120) or 23% (28/120).

The amounts requested both for successful and unsuccessful applicants show an enormous variation (see Table 1, column 5). This substantial variation is also reflected in the amount awarded to successful applicants. For successful applicants the awards requested ranged from $600 to $8,000,000, with the average request being $810,000 and the median (as many above as below) being $100,000. The amounts awarded were substantially less but also contain significant variation. The amounts awarded ranged from $600 to $3,100,000. The average award was $380,000 (47% of average requests) with the median being $50,000 (5% of median requests).[2]

For unsuccessful applicants there was also a substantial variation in the amounts requested. However, these amounts were consistently and substantially less than the amounts requested by successful applicants and even the amounts awarded. The amounts requested by these unsuccessful applicants ranged from $500 to $840,000. The average request was $140,000 (17% of the request of the successful; 37% of the award to the successful). The median requested was $21,000 (21% of the request of the successful; 42% of the award to the successful).

Three very different hypotheses present themselves concerning the fact that the amounts requested by unsuccessful applicants are so much lower than those of the successful intervenors. One suggests that as part of a strategy to induce decision makers to fund questionable applications, the applicants request lower amounts than they otherwise would. A very different one suggests there is a systematic tendency by decision makers to favour more complex and ambitious interventions so that fewer participants deal with more issues. A third one suggests that inexperienced applicants do not know the real costs and therefore request lower amounts. Moreover, they do not adequately present a clear use of the funds and therefore are denied. These possible explanations will be returned to in several places below.

### ii. The Environmental Assessment Board and the Ontario Energy Board Compared

Because of the differences in the nature of the issues decided, the jurisdictions of the Boards and their decision-making processes, it is useful to see what differences emerge between the two boards in terms of the characteristics of intervenor funding. As already indicated, the compelling differences are between the OH:DSP and all other cases. However, for completeness we compare all the OEB cases with all the EAB cases in this section. Columns 3 and 4 explore these differences. The total amount awarded by the EAB was $24,000,000 and the total by the OEB was $930,000.

The first point to remark upon is that there were more applicants for funding before the EAB, ie., 82 in 9 cases versus the 38 in 13 OEB cases while the figures for total intervenors are similar -- 278 for EAB versus 240 in the OEB. In part this can be attributed to the fact that the OEB has a higher rate of participation by corporations and businesses whose "private" interests would not be qualified for funding. Furthermore the pattern of success was quite different. In the EAB 51 out of 82 or 62% of applications were successful, whereas in the OEB 20 out of 38, or 53%, were successful. The OEB's greater "denial" rate can be challenged as high because out of the 18 intervenors who were not funded, only 4 were actually denied funding on the merits. This is because 14 intervenors withdrew or applied too late (compared with 7 out of 31 for the EAB). The reasons, if any, for the large number of applicants in the "withdrew/too late" category for the OEB will be explored later. Nevertheless, if the "withdrew/applied too late" are removed then the OEB success rate can be said to be 83% (20/24: successful applicants (20)/applicants (38) less those who withdrew (14).

Turning to amounts requested by and awarded to successful applicants there are dramatic differences between the two boards. In total $53,000,000 was requested from the EAB and $24,000,000 awarded by it. For the OEB the comparable figures were $1,600,000 requested and $930,000 awarded.

These significant global differences are consistently reflected in a breakdown of relevant figures. For successful applicants the amounts requested from the EAB ranged from $600 to $8,000,000 with the average $1,000,000 and the median $220,000. In contrast, at the OEB (again, for successful applicants) the amounts requested ranged from $4,600 to $240,000. The average was $80,000 (or 8% of the EAB average) and the median was $55,000 (or 25% of the EAB).

For the EAB awards range from $600 to $3,000,000 with the average being about $500,000 and the median $55,000. In contrast for the OEB, awards to successful applicants ranged from $4,600 (one instance where the OEB is higher) to $200,000 (or 7% of the comparable EAB figure) the average was $49,000 (or 10% of the EAB) and the median was $31,000 (or 55% of the EAB).

Regarding the requests of unsuccessful applicants, substantial differences again emerge. For the EAB, pertinent figures are $500 for the lowest to $840,000 for the highest, the average was $160,000 and the median $27,000. In contrast comparable figures for the OEB were $3,000 for the lowest (again one figure higher for the OEB) $65,000 for the highest $23,000 for the average (14% of the EAB) and $13,000 for the median (48% of the EAB).

These figures suggest that while the EAB had somewhat less of a success rate for applicants, (if one accepts that "too late/withdrew" applicants should be removed) it awards dramatically larger amounts to successful applicants. Even with unsuccessful applicants the figures for the EAB are substantially higher though not to quite the same degree. However an explanation for these startling differences is apparent and it has to do with the differences within the EAB's cases, specifically, the presence of the Ontario Hydro Demand Supply hearing.

### iii. The EAB Ontario Hydro Demand Supply Compared with other EAB and OEB Cases

#### a) The EAB OH-DSP Case

The Ontario Hydro application deals with the long-range plans for providing electrical energy to the people of Ontario and is the most intensive application of the IFPA.

> More than 200 individuals and groups are taking part in the hearing. (A) funding panel... reviewed applications from 36 intervenors for more than $60 million and awarded funding totalling more than $21 million.[3]

Because of the complexity of the hearing funding was determined in two stages. Stage I was basically to determine eligibility and to help intervenors identify their issues of interest. Stage II was to provide funding to assist in the preparation of issues and participating in the hearing, according to the plan developed in Stage I.[4]

The Ontario Hydro DSP hearing relates to the environmental assessment of Hydro's plans for how it will supply Ontario's electricity needs over the next 25 years. It falls under EAA because the Act defines "undertaking" to include plans or programs in respect of public enterprises or activities. Government plans and programs have generally not undergone EA prior to this hearing. There will be individual projects that will carry out the framework plan. For Hydro, these individual projects will also undergo EA but the question of need for them will have been determined by the DSP hearing. It is very difficult to predict the frequency with which such plan or program EAs will occur, in part because there is no clear test for when a policy becomes a "plan" or "program." We should expect that there will be more plan or program EAs in future, but they will never be the majority of EA undertakings.

Plan or program EAs are by nature more complex than most projects that fall under EA. They are usually geographically broader, affecting many more interests. Because of the broad scope of the plan for longer periods, they also require a more complex set of alternatives that must be considered.

### b) The OH-DSP and other EAB Cases

Separating OH-DSP figures from other EAB cases demonstrates how untypical the DSP hearing is: see Table 1, column 1. The separate amounts for stage I and stage II are presented in Table 2. For purposes of the analysis we have used the combined figures: see Table 2, column 3 and Table 1, column 1. While the success rate is somewhat lower in the DSP hearings (34 out of 59 or 58%) compared with other EAB cases (17 out of 23 or 74%) the startling differences arise in terms of amounts requested and awarded. The other EAB hearings involved 8 cases with 17 intervenors being awarded a grand total of $663,000. The DSP cases involved 34 intervenors being awarded $23,000,000. As well, the OH:DSP funding hearings took much longer; while the other EAB funding hearings took between a half a day and two and a half days, the OH-DSP Stage I took four days and Stage II took eight days with approximately five months between the two decisions.

The figures for requests by successful applicants illustrate these differences. For DSP the range was $5,000 to $8,000,000 with the average being $1,500,000 and the median $800,000 whereas for the other EAB cases the range was $600 to $400,000 with the average being $90,000 (or 6% of OH-DSP) and the median $55,000 (or 7% of OH-DSP).

Such substantial differences continue with amounts awarded to successful applicants. With DSP the range is $2,800 to $3,000,000 with the average being $700,000 and the median $350,000. For the other EAB cases the lower range is $600 to

$300,000 (or 10% of DSP) with the average $50,000 (or 7% of DSP) and the median being $22,000 (or 6% of DSP).

The one instance where the differences were otherwise were unsuccessful applicants. Here the lower range is much higher for other EAB cases ($10,000 versus $500 for DSP) and while the upper range was higher for DSP the differences were much less substantial (DSP: $800,000; other EAB: $650,000). In both the case of the average (DSP: $150,000; other EAB $210,000) and the median (DSP: $20,000; other EAB cases $46,000) the other EAB figures were higher.

These significant differences between DSP and other EAB cases do not end the matter. Questions still remain concerning the huge amounts requested and awarded at the DSP hearing and the likelihood that such a challenge to the resources of any similarly situated proponent will arise in the future. Moreover, there are interesting questions concerning the marked differences between amounts requested by successful and unsuccessful intervenors. These will be returned to later. For the moment we should look at the profile of the OEB and other EAB cases with the OH-DSP removed from the data set.

### c) The OEB Cases and Other EAB Cases

Once the OH-DSP figures are removed, the OEB and the EAB profiles look much more alike and in some important ways suggest a more conservative approach by the EAB (see Table 1, column 2 & 4). With fewer applicants for funding (EAB:23; OEB:38) the total amounts applied for (for successful applicants) were EAB $1,300,000 and OEB $1,600,000 and amounts awarded were EAB $660,000 and OEB $930,000. Length of time for the funding hearings were also comparable usually taking between a half a day and two and a half for most hearings for both Boards. In terms of success the rates before the two Boards were comparable. At the OEB there were 38 applicants with 20 being successful or 53% and at the EAB there were 23 applicants with 17 being successful or 70%.

For successful applicants the amounts requested did display some differences but to a far lesser degree, and without any particular significance. For the EAB the range was from $600 to $415,000 compared to OEB low $4,600, high $240,000). For funding awarded the figures between the two Boards become even closer (ie. upper range EAB: $300,000; OEB $208,000 / average EAB $51,000 and OEB $49,000).

Only for unsuccessful applicants were there consistent and huge differences with the EAB retaining the higher figures (ie: average request EAB $213,000 versus OEB: $23,000).

We believe this analysis of OEB and EAB cases without OH-DSP is significant. First, it demonstrates substantial similarities between the two Boards in terms of total amounts awarded, success rate, and, at least for successful applicants, amounts requested and especially amounts awarded. Second, the amounts awarded by both Boards, in the larger context, seem reasonable. We cannot state this with complete confidence if only because we have no indication (from the file search or otherwise) of how much proponents are spending. Without such information it is difficult to gauge the reasonableness of the amounts awarded to intervenors. This is a matter raised in the submissions and on which we will make a recommendation. We can say that when we look at the relationship of costs and intervenor funding (this section vii) it will be seen that they are consistent in the sense that only rarely was there any discrepancy between costs and intervenor funding.

A number of statements in the literature and in the submissions we received conveyed the impression that the OEB is the more conservative of the two Boards particularly in the level of funding awarded. That impression would seem to be strongly influenced by the OH-DSP hearings. Once these results are isolated, the remaining results suggest strong similarities between the two boards.

### iv. Who Applies and Who Gets Funding

Table 3 shows in more detail the applicants for funding before the OEB and the EAB divided into OH-DSP and "other" EAB cases. For more specificity we divided applicants into five subcategories: community group, individual, interest group, municipality and other. "Individual" is self-explanatory. In "municipality" we included all intervenors who were municipalities or other organizations, not municipalities in themselves, but whose membership and organization was predominantly that of municipalities such as economic development corporations. The distinction between community and interest group basically turns on the breadth of the interest the group seeks to represent. While there can frequently be legitimate disputes about classification, groups seeking to participate in issues with a more limited geographical focus were categorized into community groups (e.g. Maidstone Against Dumping, Middlesex Oxford Landowners Committee Association) while groups whose interests were not primarily geographically limited were categorized as an interest group (e.g Pollution Probe, Energy Probe). Those in the "other" category tended to be industries such as the utilities companies, but other examples are political parties, churches and provincial bodies.

The first point to take from Table 3 is the high overall success rate generally, particularly at the OEB. The denial rate for the EAB was 5 out of 23 or 22% and for the OEB was 4 out of 38 or 11%. There is a further point that needs some explanation and which was raised earlier. The OEB figures indicate some ambiguity in terms of how to characterize the success (or denial) rate. This is because, of the 18 applications not funded, only four were denied on the merits. This leaves 14 not funded because they withdrew from the process or were too late. There is evidence, in the submissions, that at least in some of the cases intervenors were refusing to continue under the conditions the OEB sought to impose upon them. Only one such instance of an application not going ahead occurred before the EAB.

For the OH:DSP, for Stage I and Stage II combined, there were 59 applicants with 19, or 32%, denied. Looking at the stages separately, for Stage I there were 51 applicants with 20, or 39%, denied, while in Stage II there were 34 applicants with 3, or 9%, denied.

The second point that needs comment is the presence of municipalities as applicants. A number of submissions to us have taken a strong position against municipalities being funded as intervenors. The resistance is based on the assertion that municipalities are governmental entities having their own tax base which permits them to raise funds to participate in hearings. They, therefore, do not meet the financial need criterion in section 7(2)(c) of the Act. Other submissions have suggested that while the point just made may be true for large municipalities it may be less true for small ones where even a modest participation could be wholly disproportionate to the municipality's budget and, therefore, it is argued that it should be possible for such municipalities to demonstrate need and be eligible for funding.

As with many other issues the experience with municipalities is different for the OEB and the EAB. Out of the 39 applications before the OEB only three have been made on behalf of municipalities with two withdrawing and, therefore, only one municipality being funded. The Town of Fort Frances applied for funding in the ICG Utilities hearing where an increase in rates was sought. Fort Frances intervened to argue economic vulnerability of its residents and received $52,000. The number of municipalities that have participated in the OEB hearings without funding is nine.

In comparison, before the EAB (excluding OH-DSP) eight applications of the twenty-three were by municipalities. Out of a total of 17 intervenors funded by the EAB, five were municipalities. Two of the funded applications were by small municipalities (Dundas and Flamborough) in the same case, Steetley Quarry Products (EP 89-04) which, incidently, seems to have been adjourned indefinitely. Nevertheless, another intervenor in the case, a citizens' group (G.A.S.P.- Greensville Against Serious Pollution) was disturbed by what they believed the effect of funding the municipality had on their intervention (sec. IV.E. (iv)). Two municipalities who intervened in the OWMC case, the Regional Municipality of Niagara and the Township of West Lincoln received substantial amounts of money in a supplementary funding decision. (Niagara total: $375,879.27; West Lincoln total: $312,181.90) However, in that same proceeding, the City of Toronto, was denied a substantial request ($339,198) on the grounds that it could reallocate funds to cover representation; similar reasons were given for rejecting the application by the Town of Milton. The fifth application by a municipality occurred in the Innisfil case. Here Innisfil Landfill Corporation was the proponent and the Town of Innisfil intervened and was awarded $300,000. Again a citizens' group, the Coalition of Ratepayers Association, and the Conservation Authority believed themselves aggrieved in terms of the treatment of their application for funding compared with Innisfil's. The number of municipalities that have participated in the hearings without funding is seven.

In the OH-DSP at Stage I there were six applications by municipalities of which three were funded; at Stage II, there were five with four funded, in the combined Stage I and Stage II there were eight applications with four funded (i.e. eight separate municipalities applied for funding in Stage I and/or Stage II and four received funding in at least one of those stages).

Overall, given the nature of the issues and proceedings regarding municipalities, it appears that the EAB may be attempting to steer a middle course between not wholly disentitling municipalities and, on the other hand, requiring those intervenors to demonstrate why their own budgets are not adequate to fund any interventions. The impact of funded municipal interventions particularly on other applications for funding is a matter we will return to in the conclusions of the Report.

The third point is with respect to aboriginals. The OH:DSP hearing is the only case under IFPA in which there were aboriginal applicants. For the combined Stage I and Stage II there were eleven applications by aboriginal groups, with three applications not being funded. The overall absence of aboriginals from proceedings would appear to raise issues relevant to such interests. The difficulties experienced by aboriginals with the process, particularly, the OH:DSP are matters which are raised in the submissions and we will return to these questions.

### v. Amount of Funding and Reasons for Divergence Between Amount Requested and Awarded

For both the EAB (without OH:DSP) and the OEB there were substantial differences between average amounts requested and awarded, see Table 1, columns 2 and 4 for successful applicants. For the EAB (without OH:DSP) this was 56% (average requested $91,444.81; average awarded $51,024.88) and for the OEB this was 62% (average requested $77,795.01; average awarded $49,048.44). For the OH:DSP this was 45% (average requested: $1,533,488.25, average awarded: $683,299.82).[5]

From the file search five reasons appear to explain divergence between requests and amounts awarded. The first concerns the funding panel forming the opinion that certain issues sought to be funded by intervenors are not relevant or already adequately covered by the proponent or some other intervenor. This is a reasonable basis for reducing a requested amount in light of the framework of the Act and there appears nothing controversial from the files themselves (though intervenors object to this happening to them and some instances will be discussed in the submissions).

The second occurs when the panel distinguishes between an intervenor's "private" and "public" interests and funds the intervenor only regarding the latter. There are only a few such instances but a prominent example is the Independent Power Producers Society of Ontario (IPPSO) which has been an intervenor before both the OEB and the EAB. There is a continuing debate at the OEB about the extent to which IPPSO represents private and not public interests.

The third reason concerns undue legal fees and is mentioned with some regularity by both Boards, specifically in terms of the number of hours requested. This is in spite of the fact that, in any event, legal fees for intervenor funding are to be calculated at Legal Aid rates which many lawyers involved in this process would claim are well below their normal billings (in terms of rate per hour).

In fact the OEB in an early decision (HR 18) stated that legal fees for intervenor funding would be funded only at 80% of the rate billed. However, other funding panels at the OEB do not seem to have carried this constraint forward. Nevertheless, the perception on the part of some of the public, particularly in the submissions, that intervenor funding is an open ended source for lawyers is being resisted quite vigorously by both Boards while attempting to ensure that intervenors do in fact obtain sound legal representation.

The fourth way in which the Boards can reduce the amounts awarded is by requiring certain funded intervenors to co-ordinate their participation when a funding panel decides there is sufficient similarity. This requirement to co-ordinate is specifically authorized by section 7(2)(f) of the Act. This option has been severely criticized, including in a number of submissions to us. Groups are fearful that important differences and perspectives will not be taken into account if intervenors are required to work together. Furthermore, limited time and resources will be consumed in working out differences so that the required co-ordination can be effected. In fact, requirements of co-ordination occur with some frequency in terms of the number of intervenors, though such a requirement has occurred in only one case before the OEB (HR 19 involving five intervenors) and three cases before the EAB (other than the OH-DSP case) (OWMC CH 87-02 involving three intervenors, Steetley Quarry EP 89-04 involving two intervenors and Innisfil CH 91-01 involving two intervenors).

The OH:DSP hearings were significantly influenced by the funding panel's attempt to coordinate interests. One of the express purposes of Stage I was: "to provide preliminary funding to eligible parties to assist them to work together to identify the issues they wish to address at the hearing and to negotiate among themselves to eliminate duplication."[6] At Stage II the amounts requested were reduced from approximately $60 million to approximately $47 million because of meetings between counsel for the panel and intervenors regarding "... a range of further consolidation, reduction of overlap, and the extension of existing coalitions."[7] Furthermore, coordination with other interests was mentioned (though seemingly not required) in approximately 20 of 55 orders in Stage I and II where the applicant was given funding.

Whether the reservations about co-ordination are justified cannot be detected from the file search. It is an issue we will return to in the conclusions after we have discussed its treatment in the submissions we received.

The fifth way in which the Boards can reduce the amount requested by intervenors is by requiring the intervenor to contribute some of the amount required. This is specifically authorized by the Act, section 7(3)(c). Again, intervenors tend to resist such a possibility believing that a wrong decision will effectively prevent them from participating.

In fact, a partial contribution is required with some frequency. The EAB (excluding OH:DSP) required 6 of its 17 funded intervenors to contribute. The OEB was less inclined to such a requirement: for only 3 out of 20 was some form of contribution a condition of funding. The amount required to be contributed ranged from less than 5% of the award to in effect 100% of it.

For the OH:DSP Table 4 shows the successful intervenors required to make a contribution in either Stage I or Stage II. Taking the combined Stage I and II, about 41% (14/34) of the successful applicants were required to make a contribution. On average the amount to be contributed was a small portion of the amount awarded 2.5% ($342,385.00 out of $13,735,187.47) but there was a range in the percentages required: from 0.3% to 50.4%. The relative contribution arises as an issue in the submissions.

There may be nothing in principle against allowing the possibility of the intervenor contributing, especially in light of the overarching need to find some rational and equitable way to place limits on spending. Nevertheless, it clearly is a concern for intervenors and it is a tool that is being used by both Boards. We will return to this issue as we discuss the submissions and we will make a specific recommendation concerning it.

### vi. Supplementary Funding

The Boards are specifically authorized by the Act (section 12) to entertain applications for supplementary funding. The idea is straightforward and, in principle, a good one: intervenors, proponents and the funding panels do not have to make once and for all judgments about the money to be awarded to intervenors in light of contingencies such as longer hearings or introduction of new issues.

Table 5 presents the results of the file search regarding supplementary applications and their awards and the original amount awarded to each applicant. While each have had approximately the same number of applicants, (the EAB having 4, the OEB having 5), the two boards experiences differ.

To explain why this is so we need to say something about the Ontario Waste Management Corporation Hearing before the Joint Board (recall that for the purposes of this section the two Joint Board Hearings are analyzed as part of the EAB statistics). The Ontario Waste Management Corporation is a Crown Corporation formed in 1981 to find and develop a hazardous waste treatment and disposal facility for Ontario. The OWMC undertaking was exempted from the EAA and then re-designated under the Act by the new Liberal government in 1985. There were further delays because of the form of the EA documents submitted for review. Finally, in 1988, the EA was submitted for government review. The undertaking is being heard by a joint board, because it involves planning and expropriations issues, as well as complex environmental issues.

The OWMC is a lengthy hearing and the application before the board is, as indicated, to establish a hazardous waste treatment and disposal facility for Ontario. The hearing commenced in November 1989 and continues today. The details are:

> to construct and operate a large, multi-faceted hazardous waste treatment and disposal facility in Smithville, in the Township of Lincoln (Regional Municipality of Niagara). The facility would receive wastes from across the province. The application is also for approval of a planning process for hazardous waste collection and for transfer stations throughout the province, should such stations be necessary.[8]

Funding for the intervenors was initially provided by OWMC (more than $2 million) and then, as the hearing approached, under Orders in Council. OWMC Orders in Council differed from other Orders in Council in that the board was "authorized not only to distribute funds but also to make recommendations to the government as to the total amount of funding to be provided."[9] Three intervenors were funded in amounts totalling more than $3 million. Intervenors are presently funded under IFPA. The initial applications to the panel under the IFPA were in the sum of $1.00 to give each funded intervenor eligibility under the Act. Subsequent to the initial application, substantial supplementary funding requests have been made twice by the three funded intervenors. The OEB's supplementary applications have occurred in five separate hearing in which significantly smaller amounts have been requested and been awarded.

Table 6 presents information on the supplementary funding. The grand total of supplementary funds awarded under the IFPA is $770,000, in total or an average of $64,000 to applicants. This is in response to successful applicants' requests totalling $2,000,000 or an average of $175,000 requested from the applicants.

The requests at the EAB ranged from $14,000 to $600,000, with an average of 220,000 and a total of $1,800,000. Requests at the OEB were decidedly more conservative: requests ranged from $1,600 to $60,000 with an average of $35,000 and a total of $105,000. The figures for requests from the OEB were generally between 5% -15% of the corresponding figures for the EAB.

The awards at the EAB ranged from $8,000 to $160,000, with an average of $90,000 and a total of $700,000. Again the awards at the OEB were substantially more conservative ranging from $1,500 to $47,000 with an average of $18,000 and a total of $70,000. The comparatively large amounts of money requested from and awarded by the EAB are attributable solely to the OWMC hearing. The average awards of each of the boards was about 40% of the board's average request. The main reasons for divergence (and in one case, denial) were lack of information, no negotiation with experts and use of this process to appeal the funding decision.

There are two issues surrounding supplementary funding which do not appear from the file search. One is whether the panel hearing the substantive issue should entertain the application for funding, which is the case at present. The second issue is the basis for assessing the amount to be awarded since the Joint Board in OWMC indicated it could attempt to gauge the actual performance of the intervenor and the way in which that intervenor has expended funds up to the hearing on supplementary funding (sec.IV.E.(vii)). We will deal with these issues once we have discussed the submissions.

### vii. Costs and their Relationship to Intervenor Funding

As discussed earlier, in addition to making awards for intervenor funding the Boards have power to make costs awards at the end of the hearing based on how they assess the participation of intervenors. The main hearing panel, and not the funding panel, awards costs. Intervenors may receive costs whether or not they received intervenor funding initially. Tables 7 and 8 present the results of the file search with regard to costs for the Boards (Joint Board cases presented with EAB statistics; DSP not included but no information, as no costs orders have been made as yet).

There are a number of observations to be made from the Tables. First, there are many more costs orders by the OEB than the EAB. This is because given the nature of OEB hearings they tend to be much shorter and the OEB has used its costs powers at their termination. Until the IFPA the EAB did not have power to award costs.

Second, in almost all instances the costs awarded were higher than the intervenor funding award (see columns 1 and 3) or are at least 100% of the costs requested (suggesting that only that amount had been expended by the intervenor). This may be due, in part, to the constraints on intervenor funding, e.g., eligible disbursements and the legal aid rate. Nevertheless, whatever the reason, it would appear that most intervenor funding awards are well within the range of amounts parties would otherwise receive in costs awards.

However, in the case of the OEB there are three instances (EBRLG 35 Energy Probe; HR 18 IPPSO; and HR 19 Energy Probe) where the costs assessed are both less than the amounts requested but also less than the intervenor funding award. Theoretically, this would mean that, if the money is spent, the intervenor might have to refund the proponent the difference. This, in fact, occurred with IPPSO (Independent Power Producers Society of Ontario) in HR 18 when the OEB ordered it to refund the difference to Ontario Hydro (though it is not clear that this order has actually been complied with.[10])

We will see that this potential exposure to having to refund some part of the intervenor funding award looms large as an issue in the submissions.

## C. A Study of Unsuccessful Applicants

There were two categories of applicants that were not funded: (1) those that were *denied* funding and (2) those that were *not considered* for funding due to withdrawals, late applications and lack of a formal application. This section of the paper focuses on the first category of applicants: those that were denied funding.

### i. Overview of Unsuccessful Applicants

Table 1 presents an overview of the amounts requested by the unsuccessful applicants. As stated earlier, they requested amounts which were consistently and substantially less than the amounts requested by successful applicants. Indeed, their requested amounts were consistently lower than the amounts awarded to successful applicants. The amounts requested by unsuccessful applicants ranged from $500 to $840,000. The average request was $140,000 (17% of the request of the successful; 37% of the award to the successful). The median requested was $21,000 (21% of the request of the successful; 42% of the award to the successful). The lower requests by the unsuccessful applicants may to some extent reflect an unfamiliarity with the procedures and costs involved in intervention.

Table 3 presents information on the types of applicants denied funding. As indicated earlier, we used the following categories: "municipality," "interest group," "individual," "community group," "aboriginal" and "other." Looking at the OEB and the "other" EAB cases (without the DSP) those denied funding were three municipalities, two individuals and one interest group. As well, three applicants falling into the "other" category were denied funding. Adding the DSP figures, the profile of all applicants denied is: five municipalities, eight interest groups, one community group, seven individuals, three aboriginals and four others. Of the others that have been denied one has been in the OEB (F & V Energy - EBRO 465), and three have been in the EAB (Corp of St. Paul's Parish - EP 89-04, Niagara Peninsula Conservation Authority - OWMC CH 87-02, and the Ontario Green Party - OH EA 90-01)

In a recent study, An Evaluation of the Funding Denials under the Intervenor Funding Project Act, 1988 by L. Huinink, it was found that few legitimate intervenors - those that met the criteria - were denied funding and this is consistent with our findings. However another point of interest that is raised in the paper is that once those groups denied funding on grounds of sufficient resources are removed from the calculations, a significant proportion (about 70%) of the remaining unsuccessful applicants did not have legal counsel.[11]

The following two sections, "Reasons for Denial" and "Interview Findings" will summarize information from Huinink's paper.[12] However, some caution is required in relying on these figures since they only take account of files up to June 27, 1990, which would not include several hearings including the Stage II of the OH - DSP, and a number of hearings before the OEB and, on the other hand, the study includes the Timber Management EA, a case funded under Order-in-Council provisions. In addition, since the applicable numbers are small the resulting percentages may not be statistically reliable.

### ii. Reasons for Denial

Section 7 of the Act sets out the criteria to be considered by the funding panel in their decisions. Huinink's paper finds that there are three subsections which are relied upon predominantly in denying funding. They are: section 7(2)(e), which requires an established record of concern; section 7(2)(g), which requires a clear proposal for funds; and section 7(2)(b), which requires that separate and adequate representation of the interest would be of assistance to the board.

About 20% of the funding denials were based on the lack of a clear proposal for the group's funds. The criterion which proves most difficult for applicants to satisfy is that contained in section 7(2)(b), with about 24% of unsuccessful intervenors being denied on this criteria.[13]

It was found that 72% of the intervenors denied funding continued to participate in the hearings. The paper suggests a combination of two explanations: (1) that those deemed having sufficient resources to participate did indeed have those funds, and (2) that the intervenors that were denied on the basis of not having a separate interest, felt that they did indeed have a separate interest and endeavoured to participate at least at some level.

### iii. Interview Findings

Huinink conducted interviews with many of the unsuccessful applicants regarding their various experiences before the panels. She has suggested that the lack of legal counsel may have a bearing on whether the group was funded or not. Huinink found that the unsuccessful applicants' views on counsel representation corresponded with her hypothesis: "A majority of the intervenors who did not obtain legal counsel believed that their chances for funding would have been improved had they retained legal counsel."[14] There was a feeling among the unsuccessful applicants that the hearing was too adversarial to participate "on par" with those applicants who did have legal counsel.

Huinink found that almost half of the unsuccessful applicants concluded that their interests in the proposal were indeed separate. Unsuccessful applicants reported varying success of funded applicants in representing their specific concerns: the responses varied from inadequately represented to having their interests communicated better by the successful applicants. The other category of unsuccessful applicants that emerged during the interviews was a small number of intervenors that did not have a separate issue but had wanted to monitor the hearing.[15]

Generally, unsuccessful applicants who were not funded because they did not have a separate issue concluded that their issues did not get the consideration that they should before the board because the board's emphasis was on achieving an efficient hearing rather than on the consideration of the issues.[16]

Denial on the basis of both section 7(2)(b), (that separate and adequate representation of the interest would assist the board and contribute substantially to the hearing), and section 7(2)(g), (that the intervenor has a clear proposal for its use of funds which might be awarded), were seen as unfair given the legal constraints of the funding panel regarding determination of issues in the hearing. It was believed that "the funding panel should (not) have had the power to determine the main hearing issue when legally the power does not exist"[17] especially when funding decisions are based on their conclusions.

Huinink questioned the unsuccessful applicants on the appeal process and found that the "appeal procedure under the IFPA does not appear to be an accessible route for intervenors who believe they have been denied funding unfairly." The unfamiliarity with and perceived expense of the appeal process were cited as the obstacles.

Finally, Huinink asked the unsuccessful applicants a series of general questions about the process followed in applying and their understanding of why they were denied funding. Two related problems surfaced: (1) a lack of information about the IFPA, and (2) deficient knowledge and understanding on the part of the applicant of the process.[18]

## D. A Comparison of IFPA Cases and Intervenor Funding by Order-in-Council

We were not required to do a comparative analysis of the IFPA cases and Orders in Councils, and in light of the financial and time constraints it was not possible to do a comprehensive study. However the Canadian Environmental Defence Fund (CEDF) Report does provide an analysis which we will present below. Nevertheless, caution must be taken with the CEDF figures since they are based on only about one and a half years (only about one half of the three year pilot project).[19] Moreover, the CEDF's Orders in Council analysis includes funds awarded for the PCB Inquiry, convened under the Public Inquiries Act.

Particular note should be taken of the two most complex cases under Order-in-Council, OWMC and the Timber Management, because they are relevant to some overarching issues we will turn to in the recommendations. The OWMC has already been discussed (see III.B.(ii) and this part vi). The Timber Management hearing involves the EA of a "class of undertakings" related to forest management by Ministry of Natural Resources on Crown lands in northern Ontario. There is a large area covered and many interests affected, including aboriginals, workers, northern communities, wildlife, timber companies, tourist outfitters and the environment generally. This hearing commenced in May of 1988 and continues today, much longer than originally anticipated. Initial funding for intervenors was limited to $300,000, which was awarded to nine intervenors (1 environmental group; 3 aboriginal; 1 municipal; 3 individual; 1 community group). Applications had come from 22 intervenors asking for $1 million.[20]

The hearing proved longer than anticipated and funds were again made available by Order in Council, this time in the sum of $900,000 to be distributed over two fiscal years. Five of the funded intervenors reapplied for funds and four of the original applicants who had been rejected reapplied, with total requests of $2.2 million. All of the funded intervenors were awarded more funds and were given priority over those who did not receive funding initially. Of those initially rejected who reapplied, two received funding.[21]

In early 1991, it became apparent that the hearing would go much longer than anticipated and that more funds were necessary to enable participation to continue to the end of the hearing. An additional $450,000 was made available. The previously funded Nishnawbe-Aski Nation, which had failed to file financial statements or invoices for its expenditures under the prior order, was allocated more funds but these were offset against unspent funds. No further claims were to be processed until the necessary statements were filed. The surplus (allocation over unspent funds) was ordered remitted for redistribution to other intervenors. Second, the Order in Council specifically directed that the Canadian Paperworkers Union, which had been denied funding at earlier stages, should be funded.[22]

### i. A Basic Comparison of the Processes

In a recent article[23] Joseph Castrilli compares the IFPA and these two major cases under the Order in Council: Ministry of Natural Resources Timber Management Class Environmental Assessment (MNR) and the Ontario Waste Management Corporation in terms of processes used:

| Orders-in-Council | IFPA |
|---|---|
| funding hearings occurred before the preliminary hearings and before the government review released or final party status determined by the board hearing the substantive matter (MNR and OWMC); | funding hearings expected to normally occur after government review released and preliminary hearing in main matter held and intervenor party status determined; |
| specific categories of eligible and ineligible recipients of public funding identified including local and regional governments (OWMC); | Act silent on identifying categories of eligible recipients for intervenor funding other than indicating that recipient must not be a private interest - s. 7(1); |
| Obligation upon recipients to | no obligation though |

| | |
|---|---|
| raise a percentage of funds themselves (MNR); | consideration under s. 7(2) criteria; |
| a fixed amount of funding was known to be available in advance of the funding hearing (MNR); | no limitation in advance under the statute; amount determined by the intervenor funding applicant budget proposal and funding panel assessment thereof: |
| proponent not a party to the funding panel proceeding even though ultimate source of funds (MNR).[24] | proponent entitled to party status at funding hearing under s. 6(6) as it is obligated in law to make any payment ordered. |

And, we would add, costs awards are available to intervenors under IFPA but were not under some Orders-in-Council where hearings were before the EAB, including the Timber hearing.

### ii. Problems with the Orders-in-Council Process[25]

The CEDF Report outlines five problems with the Orders-in-Council process[26]:

1. Uncertainty about the process: potential intervenors did not know at the outset of a proposed undertaking if, or how much intervenor funding would be available for that particular case.

2. Inconsistent funding decisions: there was a lack of consistency by the JB, OEB, and EAB in deciding whether to award funding.

3. Lack of clearly defined objectives and prescribed procedures for making funding awards: no written policy or guidelines existed directing Cabinet as to when or how much funding should be awarded.

4. The potential for breaking rules governing the distribution of funding: inconsistent direction was given by boards as to the proper use of intervenor funding.

5. The political nature of the ad hoc process: time and effort were necessary to lobby politicians to ensure funding was available.

### iii. Highlights from the CEDF Study

The CEDF study, authored by Heather Campbell, presents an overview of the funds requested and received under Orders in Council (again, we note the cautions expressed above concerning the CEDF figures):

> ...when the OWMC requests of $7 million (are) excluded, the total amount requested before 1988 (is) $3,173,020 in 29 cases [(sic) applications?] for an average funding request of $109,414. Also, before 1988 and excluding OWMC, total funds allotted equalled $656,708 for an average allotment of $22,645 or approximately 20% of the amount requested.
>
> After the Act was passed in 1988, total funds requested increased to $6,388,945 across 44 cases [(sic) applications?] for an average request of $145,203, an increase of 33%. Further after 1988, the funds received increased to $2,715,258 for an average allotment of $61,710, almost three times the average received before 1988.[27]

The CEDF makes several observations comparing the IFPA and the Order in Council cases:

> ....the intervenor funding process is allocating money to a greater number of cases and in increasing amounts that reflects a more reasonable assessment of the cost of participating in major energy and environmental decisions. The increases also reflect increasing costs due to inflation and the expenses involved (legal counsel and expert assistance) in mounting a credible case.[28]
>
> ~~~
>
> Prior to 1988, almost half of the awards for funding were allotted to community groups (47%) while interest groups participation made up only 25% of all awards. After 1988, the balance of participation was reversed with interest groups accounting for 43% of those receiving funds and community groups 23%. In addition, the number of interventions by both aboriginal groups and municipalities increased from 9% to 13%.
>
> The change in types of participants over time suggests that prior to the Act, funding through orders-in-council focused for the most part on community groups and that communities were primarily responsible for defending their interests.

> The pattern observed after 1988 indicates that the IFPA has allowed a broader set of interests to participate through funding. More complete participation, not only by those who are directly affected but also by groups with broader environmental, energy and public interests has occurred after 1988.[29]

> After the Act was implemented,... the proportion of requests granted increased to 66% [from the Order in Councils 52%], suggesting that a substantial number of those applying were able to receive funds using a funding process with clear eligibility criteria and with an established application procedure to follow.[30]

* * *

> Aboriginal groups,..., asked for 97% more funds and received an increase 17% less than the average gain enjoyed by other groups. This suggests that although the number of intervenors supported by funding after 1998 has increased both in general (29 to 44 cases) and for aboriginal groups aboriginal groups(3 to 6 cases) have not received proportional increases in the amount of awards compared particularly with individual and municipal participants.[31]

## Addendum

As indicated earlier, in order to complete the Report on time a cut-off date of 15 December was selected for searching the files.

After that date there were two more decisions of the OEB: EBRO 476 and EBO 169. The first, EBRO 476 is in line with earlier decisions (two applicants, both successful, total award: $36,912; Average award: $18,456). However, the second case, EBO 169, awarded a substantial amount (total Award: $308,768.26) to six intervenors out of eleven applicants (average award: $51,461.38). Of the five applicants that did not receive funding one withdrew before the hearing, one had not established need, one had no established interest, and two were characterized as representing only "private" interests.[32]

At the EAB there was a further decision in the Innisfil case (CH 91-01) agreeing to deal with further applications by 2 parties by way of supplementary funding but a hearing and decision on specific amounts of money has been deferred.

# TABLE 1
# OVERALL SUMMARY

| | 1<br>OH:DSP | 2<br>EAB W/OUT OH ** | 3<br>EAB TOTAL | 4<br>OEB | 5<br>TOTAL |
|---|---|---|---|---|---|
| Number of Cases (subsequent IFPA) | 1 | 8 | 9 | 13 | 22 |
| Number of Applicants for Intervention | 216 | 62 | 278 | 240 | 518 |
| Number of Applicants for Funding | 59 | 23 | 82 | 38 | 120 |
| Represented by Lawyer | 35 | 21 | 56 | 25 | 81 |
| SUCCESSFUL APPLICANTS | | | | | |
| Number of Applicants | 34 | 17 | 51 | 20 | 71 |
| Represented by Lawyer | 26 | 15 | 41 | 17 | 58 |
| Request *** | | | | | |
| Range | | | | | |
| Lower | $5,010.00 | $599.20 | $599.20 | $4,826.00 | $599.20 |
| Upper | $7,884,550.00 | $415,345.27 | $7,884,550.00 | $238,778.00 | $7,884,550.00 |
| Average | $1,533,488.25 | $91,444.81 | $1,112,892.24 | $77,795.01 | $808,451.88 |
| Median | $783,051.03 | $54,957.22 | $217,847.42 | $55,383.00 | $99,838.07 |
| Total | $52,138,600.70 | $1,280,230.36 | $53,418,830.52 | $1,555,900.10 | $54,974,730.62 |
| Amount Awarded *** | | | | | |
| Range | | | | | |
| Lower | $2,800.00 | $599.20 | $599.20 | $4,625.00 | $599.20 |
| Upper | $3,141,053.00 | $299,085.31 | $3,141,053.00 | $208,400.00 | $3,141,053.00 |
| Average | $683,299.82 | $51,024.88 | $508,415.25 | $49,048.44 | $376,173.29 |
| Median | $350,646.50 | $21,659.50 | $54,537.00 | $30,820.00 | $49,020.75 |
| Total | $23,232,193.72 | $663,327.89 | $23,895,520.76 | $931,921.45 | $24,827,442.21 |
| UNSUCCESSFUL APPLICANTS | | | | | |
| Number of Applicants | 25 | 6 | 31 | 18 | 49 |
| Withdrew/ Too Late **** | 6 | 1 | 7 | 14 | 21 |
| Denied Funding | 19 | 5 | 24 | 4 | 28 |
| Represented by Lawyer | 9 | 6 | 15 | 8 | 23 |
| Request | | | | | |
| Range | | | | | |
| Lower | $500.00 | $10,480.00 | $500.00 | $3,000.00 | $500.00 |
| Upper | $837,800.00 | $648,421.00 | $837,800.00 | $64,795.31 | $837,800.00 |
| Average request | $147,882.17 | $213,102.33 | $162,060.46 | $23,292.88 | $141,502.28 |
| Median | $23,164.00 | $46,267.63 | $27,288.00 | $12,697.50 | $21,045.00 |
| Total | $2,661,879.10 | $1,065,511.65 | $3,727,390.75 | $93,170.81 | $3,820,561.56 |

* - Cut-off date for file analysis 15 Dec 1991; see addendum at the end of this section.

** - The two Joint Board Cases CH 87-02 (OWMC) and CH 91-01

*** - Although the totals are the actual totals, the range, average, and median figures do not include the $1.00 awards or requests. This occurred in the cases CH 87-02 (OWMC) and EBRLG 35.

**** - Also includes applications not considered because the appropriate application was not made or applicants were dismissed on the basis that they did not appear at the funding hearing

# TABLE 2
# ONTARIO HYDRO - OVERALL SUMMARY

| | STAGE I | STAGE II | STAGE I & II |
|---|---|---|---|
| Number of cases (subsequent IFPA) | 1 | 1 | 1 |
| Number of Applicants for Intervention * | N/A | N/A | 216 |
| Number Applicants for Funding | 51 | 34 | 59 |
| Represented by Lawyer | – | – | 26 |
| **SUCCESSFUL APPLICANTS** | | | |
| Number of Applicants | 26 | 29 | 34 |
| Represented by Lawyer | 21 | 21 | 26 |
| Request ** | | | |
| Range | | | |
| Lower | $989.00 | $5,010.00 | $5,010.00 |
| Upper | $2,096,200.00 | $5,780,350.00 | $7,884,550.00 |
| Average | $193,770.92 | $1,616,296.47 | $1,533,488.25 |
| Median | $46,676.00 | $993,210.00 | $763,051.03 |
| Total | $5,038,044.00 | $46,872,597.66 | $52,138,600.66 |
| Amount Awarded ** | | | |
| Range | | | |
| Lower | $661.00 | $2,800.00 | $2,800.00 |
| Upper | $349,300.00 | $2,791,753.00 | $3,141,053.00 |
| Average | $65,585.00 | $742,309.71 | $683,299.82 |
| Median | $31,481.50 | $439,422.10 | $350,846.50 |
| Total | $1,705,212.00 | $21,526,981.72 | $23,232,193.72 |
| **UNSUCCESSFUL APPLICANTS** | | | |
| Number of Applicants | 25 | 5 | 25 |
| Withdrew/ Too Late | 5 | 2 | 6 |
| Denied Funding | 20 | 3 | 19 |
| Represented by Lawyer | 9 | 4 | 9 |
| Request * | | | |
| Range | | | |
| Lower | $500.00 | $25,000.00 | $500.00 |
| Upper | $837,800.00 | $188,458.00 | $837,800.00 |
| Average request | $133,818.96 | $106,729.00 | $147,882.17 |
| Median | $23,814.00 | - | $23,814.00 |
| Total | $2,676,379.10 | $213,458.00 | $2,881,879.10 |

* - Missing Intervenors that did not apply for funding in Ontario Hydro

** - Not included are requests and awards for $1.00

Note: The number of Intervenors in total is not equal to the numbers of intervenors in stage I & II, as intervenors that applied in both stages are counted as one. As well, total requests from from Stage I and from Stage II are not equal to total when the two stages are combined because of unsuccessful candidate from stage I being successful in stage II.

# TABLE 3
# TYPES OF INTERVENORS

| | OH:DSP | | | | "Other" EAB (without OH:DSP) | | | | EAB (total of OH and "other" EAB) | | | | OEB | | | | TOTAL | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Appl | Funded | Denied Funds | Not Considered | Appl | Funded | Denied Funds | Not Considered | Appl | Funded | Denied Funds | Not Considered | Appl | Funded | Denied Funds | Not Considered | Appl | Funded | Denied Funds | Not Considered |
| Other | 2 | 1 | 1 | 0 | 4 | 2 | 2 | 0 | 6 | 3 | 3 | 0 | 6 | 0 | 1 | 5 | 12 | 3 | 4 | 5 |
| Municipality | 8 | 4 | 2 | 2 | 8 | 5 | 3 | 0 | 16 | 9 | 5 | 2 | 3 | 1 | 0 | 2 | 19 | 10 | 5 | 4 |
| Interest | 23 | 14 | 7 | 2 | 3 | 3 | 0 | 0 | 26 | 17 | 7 | 2 | 20 | 16 | 1 | 3 | 46 | 33 | 8 | 5 |
| Individual | 7 | 1 | 5 | 1 | 2 | 2 | 0 | 0 | 9 | 3 | 5 | 1 | 7 | 2 | 2 | 3 | 16 | 5 | 7 | 4 |
| Aboriginal | 11 | 8 | 3 | 0 | 0 | 0 | 0 | 0 | 11 | 8 | 3 | 0 | 0 | 0 | 0 | 0 | 11 | 8 | 3 | 0 |
| Community | 8 | 6 | 1 | 1 | 6 | 5 | 0 | 1 | 14 | 11 | 1 | 2 | 2 | 1 | 0 | 1 | 16 | 12 | 1 | 3 |
| Totals | 59 | 34 | 19 | 6 | 23 | 17 | 5 | 1 | 82 | 51 | 24 | 7 | 38 | 20 | 4 | 14 | 120 | 71 | 28 | 21 |

# TABLE 4
# OH-DSP: CONTRIBUTIONS

## Contributions for those successful intervenors required to make contributions in either Stage I or Stage II

| Intervenor | Stage I (6 out of 26 successful applications) | | | | Stage II (10 out of 29 successful applications) | | | | Stage I & II (14 out of 34 successful applications) | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Amount Req | Allocation | Contribution | Percentage | Amount Req | Allocation | Amount | Percentage | Amount Req | Allocation | Contribution | Percentage |
| Area Economic Dev. Committee (Deep River) & Project Put It Here?? | $99,917.00 | $29,472.00 | | | $107,856.83 | $66,346.67 | $15,500.00 | 23.4% | $207,773.83 | $95,818.67 | $15,500.00 | 16.2% |
| Central Ontario Coalition Concerning Transmission Systems Inc. | $9,823.00 | $9,962.00 | $1,000.00 | 10.0% | $1.00 | $0.00 | | | $9,824.00 | $9,962.00 | $1,000.00 | 10.0% |
| Coalition, Friends of the Earth, Greenpeace, et al | $429,463.00 | $349,200.00 | $6,250.00 | 1.8% | $4,119,425.00 | $2,791,780.00 | $30,000.00 | 1.1% | $4,548,888.00 | $3,141,003.00 | $36,250.00 | 1.2% |
| Energy Probe Research Foundation | | | | | $2,438,194.00 | $594,720.00 | $30,000.00 | 5.0% | $2,438,194.00 | $594,720.00 | $30,000.00 | 5.0% |
| Independent Power Producers' Society of Ontario | $592,126.00 | $95,638.00 | | | $3,548,876.00 | $2,700,908.00 | $50,000.00 | 1.9% | $4,141,002.00 | $2,796,546.00 | $50,000.00 | 1.8% |
| International Great Lakes Coalition | $14,500.00 | $0.00 | | | $14,700.00 | $14,680.00 | $500.00 | 3.4% | $29,200.00 | $14,680.00 | $500.00 | 3.4% |
| Moose River/James Bay Coalition | $68,264.00 | $53,068.00 | | | $3,479,845.00 | $1,915,891.00 | $50,000.00 | 2.6% | $3,548,109.00 | $1,968,959.00 | $50,000.00 | 2.5% |
| Municipal Electric Association | $140,070.00 | $99,766.00 | | | $3,794,401.00 | $2,349,086.00 | $100,000.00 | 4.3% | $3,934,471.00 | $2,448,852.00 | $100,000.00 | 4.1% |
| Northumberland Environmental Protection | $4,400.00 | $2,503.00 | $300.00 | 12.0% | $17,345.00 | $13,782.90 | | | $21,745.00 | $16,285.90 | $300.00 | 1.8% |
| Northwatch | $80,607.00 | $119,423.00 | | | $3,401,690.00 | $1,686,776.00 | $6,000.00 | 0.3% | $3,482,297.00 | $1,806,199.00 | $6,000.00 | 0.3% |
| Pollution Probe Foundation | $45,575.00 | $41,004.00 | $8,400.00 | 20.5% | $389,392.00 | $328,180.00 | $30,000.00 | 9.1% | $434,967.00 | $369,184.00 | $38,400.00 | 10.4% |
| Riverwatch Env. Group (Cayuga) & HELP (Halton Env. Land Protect | $107,585.00 | $26,012.00 | $436.00 | 1.7% | $188,495.00 | $0.00 | | | $296,080.00 | $26,012.00 | $436.00 | 1.7% |
| Six Mile Lake Cottagers' Assoc. | $23,876.00 | $7,931.00 | $4,000.00 | 50.4% | $25,000.00 | $0.00 | | | $48,876.00 | $7,931.00 | $4,000.00 | 50.4% |
| Solar Energy Society of Canada | | | | | $672,882.06 | $439,422.10 | $11,000.00 | 2.5% | $672,882.06 | $439,422.10 | $11,000.00 | 2.5% |
| AVERAGE | $135,429.25 | $69,509.08 | $3,397.67 | 4.9% | $1,589,731.84 | $921,505.61 | $32,200.00 | 3.5% | $1,706,789.19 | $981,084.82 | $24,456.07 | 2.5% |
| TOTALS | $1,894,809.00 | $834,109.00 | $20,386.00 | 2.4% | $22,256,245.89 | $12,901,078.47 | $322,000.00 | 2.5% | $23,895,048.66 | $13,735,187.47 | $342,385.00 | 2.5% |

## TABLE 5
## SUPPLEMENTARY FUNDING

### Original Funding Award, Supplementary Funding Request, Allocations

| Board | Proceeding | Intervenor | Original Award IFPA | Total Requested | Awarded |
|---|---|---|---|---|---|
| JB | CH 87-02 | Township of West Lincoln (Two Req. for Supplementary Funding) | $1.00 | a) $333,025.00<br>b) $181,623.94 | a) $153,659.13<br>b) $84,666.06 |
| | CH 87-02 | Ont. Toxic Waste Research Coalition (Two Req. for Supplementary Funding) | $1.00 | a) $199,676.00<br>b) $121,427.18 | a) $7,809.01<br>b) $123,123.06 |
| | CH 87-02 | Reg Mun of Niagara (Two Req. for Supplementary Funding) | $1.00 | a) $230,139.00<br>b) $154,604.61 | a) $24,600.24<br>b) $128,076.00 |
| | CH 87-02 | Fourth Intervenor: A Tri-Party (West Lincoln, OTWRC & Niagara) request for funds for shared experts (Two Req. for Supplementary Funding) | N/A | a) $577,885.00<br>b) $14,300.00 | a) $160,531.66<br>b) $13,787.99 |
| EAB | EP 89-04 | Greensville Against Serious Pollutions | $15,400.00 | $50,580.00 | $0.00 |
| OEB | EBLO 234 | MOLCA | $206,400.00 | $64,625.00 | $0.00 |
| | HR 19 | Energy Probe | $83,250.00 | $1,573.00 | $1,573.00 |
| | EBRLG 35, | F. Warren Hurst | $1.00 | $45,274.00 | $20,614.00 |
| | EBRO 470 | Consumers Coalition | $58,063.00 | $56,581.00 | $47,332.17 |
| | EBRO 473 | Consumers Coalition | $83,176.61 | N/F | $1,500.00 |

# TABLE 6
## SUPPLEMENTARY FUNDING - EAB & OEB SUMMARY

| | EAB* | OEB | TOTAL |
|---|---|---|---|
| Applicants for Supplementary Funding | 4 | 5 | 9 |
| Applications for Supplementary Funding ** | 9 | 5 | 14 |
| Successful Applications | 8 | 4 | 12 |
| SUCCESSFUL REQUESTS *** | | | |
| Range | | | |
| Lower | $14,300.00 | $1,573.00 | $1,573.00 |
| Upper | $577,885.00 | $58,581.00 | $577,885.00 |
| Average | $226,585.09 | $35,142.67 | $174,373.51 |
| Total | $1,812,680.73 | $105,428.00 | $1,918,108.73 |
| AWARD **** | | | |
| Range | | | |
| Lower | $7,809.01 | $1,500.00 | $1,500.00 |
| Upper | $160,531.66 | $47,332.17 | $160,531.00 |
| Average | $87,031.65 | $17,754.79 | $63,939.36 |
| Total | $696,253.17 | $71,019.17 | $[illegible]7,272.34 |

* - No supplementary award, as yet, for OH:DSP

** - This number includes multiple applications by the same intervenor, In the OWMC three of the intervenor apply on two separate ocasions for funding, as well the three collectively applied twice for expert funding.

*** - Record of one of OEB's successful applicant's request was not found and therefore is not included in the calculations.

****- Although the expert funding was divided among the parties, it was applied for separately and has been used in these calculations as 1 award.

# TABLE 7
# COST ASSESSMENTS - EAB

| Proceeding | Intervenor | 1<br>Funding Award | 2<br>Costs Req | 3<br>Amount of Cost Award | Comments |
|---|---|---|---|---|---|
| CH 87-02 | | | | | Costs have not yet been awarded |
| EP-89-03 | CWMLC | $54,537.02 | $97,383.87 | $91,727.33 | 100% legal,100% expert @ lower rate |
| EP 89-02* | Maidstone Against Dumping (MAD) | $132,117.00 | $108,879.00 | $108,879.00 | 100% of Costs |
| EP 89-04 | | | | | Adjourned Indefinitely |
| EA 89-01 | | | | | Adjourned Indefinitely |
| EP 90-02 | | | | | Costs have not yet been awarded |
| EP 90-03 | | | | | Costs have not yet been awarded |
| CH 91-01 | | | | | Costs have not yet been awarded |

* Hearing Settled

# TABLE 8
# COST ASSESSMENTS - OEB

| Proceeding | Intervenor | 1<br>Funding Award | 2<br>Cost req | 3<br>Cost Award |
|---|---|---|---|---|
| EBLO 234 | Ian Goudy | | | N/A |
| | MOLCA | $208,400.00 | $411,588.00 | $323,586 |
| EBRLG 33 | Assoc of Municipalities of Ont | No Appl | | $1,884.23 |
| EBRLG 35 | Council of Canadians | $22,800.00 | $44,197.00 | $25,086 |
| | F. Warren Hurst | $20,614.00 | $105,817.00 | $76,403 |
| | Energy Probe | $25,241.80 | $44,223.00 | $22,760.53 |
| EBRO 462 | Energy Probe | $20,154.00 | $49,840.00 | $34,253.97 |
| EBRO 465 | Energy Probe | | | N/A |
| EBRO 467 | Town of Fort Frances | | | N/A |
| HR 18 | Energy Probe | $66,489.00 | $117,658.00 | $73,543 |
| | IPPSO | $30,620.00 | $35,359.00 | $25,946.18 |
| HR 19 | Energy Probe | $83,250.00 | $59,004.00 | $45,498.90 |
| | Arnold Earl | $4,625.00 | $379.80 | $1000 |
| HR 20 | Energy Probe | | | N/A |
| | Mr. Arnold Earl | | | N/A |

COSTS HAVE NOT YET BEEN AWARDED FOR: EBLO 239, EBRO 473, EBRO 474

N/A - Not Assessed as of Dec 15, 1991

# NOTES TO SECTION V

1. Table 1 in the text does not include requests and awards for $1: see Ch 87-02 (OWMC) and EBRLG 35. We have done this as a more conservative way of presenting the results. If the $1 awards were included Table 1 would appear as follows:

| | 1<br>CH:DSP | 2<br>EAB W/OUT CH ** | 3<br>EAB TOTAL | 4<br>OEB | 5<br>TOTAL |
|---|---|---|---|---|---|
| Number of cases (subsequent IFPA) | 1 | 8 | 9 | 13 | 22 |
| Number of Applicants for Intervention | 216 | 62 | 278 | 240 | 518 |
| Number of Applicants for Funding | 59 | 23 | 82 | 38 | 120 |
| Represented by Lawyer | 35 | 21 | 56 | 25 | 81 |
| SUCCESSFUL APPLICANTS | | | | | |
| Number of Applicants | 34 | 17 | 51 | 20 | 71 |
| Represented by Lawyer | 26 | 15 | 41 | 17 | 58 |
| Request | | | | | |
| Range | | | | | |
| Lower | $5,010.00 | $1.00 | $1.00 | $4,825.00 | $1.00 |
| Upper | $7,884,550.00 | $415,345.27 | $7,884,550.00 | $236,778.00 | $7,884,550.00 |
| Average | $1,533,488.25 | $75,307.67 | $1,047,428.06 | $78,170.76 | $774,291.96 |
| Median | $763,051.03 | $43,832.50 | $138,129.00 | $55,383.00 | $80,853.00 |
| Total | $52,138,600.56 | $1,280,230.36 | $53,418,830.92 | $1,555,800.10 | $54,974,730.62 |
| Amount Awarded | | | | | |
| Range | | | | | |
| Lower | $2,800.00 | $1.00 | $1.00 | $1.00 | $1.00 |
| Upper | $3,141,053.00 | $289,095.31 | $3,141,053.00 | $208,400.00 | $3,141,053.00 |
| Average | $683,299.82 | $39,019.27 | $468,539.62 | $46,596.07 | $349,682.28 |
| Median | $330,946.50 | $13,700.00 | $42,378.50 | $30,546.40 | $40,470.00 |
| Total | $23,232,193.72 | $663,327.89 | $23,895,520.76 | $931,921.45 | $24,827,442.78 |
| UNSUCCESSFUL APPLICANTS | | | | | |
| Number of Applicants | 25 | 6 | 31 | 18 | 49 |
| Withdrew/ Too Late *** | 6 | 1 | 7 | 14 | 21 |
| Denied Funding | 19 | 5 | 24 | 4 | 28 |
| Represented by Lawyer | 9 | 6 | 15 | 8 | 23 |
| Request | | | | | |
| Range | | | | | |
| Lower | $500.00 | $10,460.00 | $500.00 | $3,000.00 | $500.00 |
| Upper | $837,800.00 | $849,421.00 | $837,800.00 | $64,795.31 | $837,800.00 |
| Average request | $147,862.17 | $213,102.33 | $162,080.46 | $23,282.88 | $141,502.26 |
| Median | $39,814.00 | $46,357.69 | $37,359.00 | $12,887.50 | $21,045.00 |
| Total | $3,691,679.10 | $1,065,511.65 | $4,757,190.75 | $93,170.31 | $4,850,360.84 |

* - Cut-off date for file analysis 15 Dec 1991

** - The two Joint Board Cases CH 87-02 (OWMC) and CH 91-01 [illegible] are presented with EAB cases

*** - Also includes applications not considered because appropriate application was not completed or applicants were dismissed on the basis that they did not appear at the funding hearing.

2. The percentage of 48% pertaining to averages is derived from the two figures, the average award and the average request. If each separate request and corresponding award is examined, the percentages range from 2% to 100%, with the average percentage being 60%. The percentage of 51% pertaining to the medians is also derived from a comparison of two figures obtained from the actual awards and requests; the median request of approximately $51,000 and the median award of approximately $100,000. Alternatively, the median percentage comparing each individual request and corresponding award is 56%.

3. Environmental Assessment Board, Annual Report, 1 March 1991, p. 13.

4. Ibid., p.18.

5. These percentages are derived from a comparison of two figures obtained from the actual awards and requests average award and the average request. If each separate request and corresponding award is examined; the EAB percentages range from 4% to 100% with the average percentage being 64%, the OEB percentages range from 10% to 100% with the average percentage being 67%, and the OH:DSP percentages range from 2% to 100% with the average percentage being 33%.

6. Decisions and Reasons 27 June 1990, p.4.

7. Decisions and Reasons 14 December 1990, p.21.

8. Environmental Assessment Board, Annual Report, March 1991, p.12.

9. Environmental Assessment Board, Annual Report, March 1989, p.6.

10. R. Horwood, The Ontario Intervenor Funding Project 1988: Its Review and Reform and A Model to Provide for Public Interest Participation in Regulatory Proceedings in Canada, (PIAC), August 1991, p.60.

11. L. Huinink, "An Evaluation of the Funding Denials under the Intervenor Funding Project Act, 1988," BAA Thesis, Ryerson Polytechnical Institute, 1991.

12. Ibid.

13. Ibid., p.84.

14. Ibid., p.90.

15. Ibid., p.92.

16. Ibid., p. 103.

17. Ibid. p.104.

18. Ibid. pp.97-102.

19. As well as discrepancies between the CEDF Report and our figures due to our study including those cases that came after the CEDF report, some figures may be inaccurately reported. For example, in the CEDF case of EAB: EP-89-04: the Town of Dundas' actual proposed budget was $55,600 and the actual award was $13,700, while the CEDF mistakenly reports (on page B3.5) the Town of Dundas' budget as $172,362 and the award as $60,095 These figures are the overall proposed budget and award for the all intervenors in the EAB: EP-89-04.

20. EAB, EA-87-02, Timber Management Class EA, February 29, 1988.

21. Timber Management Class EA, July 23, 1991

22. Timber Management Class EA, July 23,1991.

23. J. Castrilli, *Intervenor Funding - Intervenor Funding Project Act, 1988* (30 April, 1991, Insight), p.17.

24. Note that MNR appeared at the initial hearing and "could have challenged funding proposals but did not." Letter from Hon. C. Wildman, Ministry of Natural Resources, Jan. 31, 1998.

25. Heather Campbell, *Intervenor Funding and the Intervenor Funding Project Act in Ontario. A report prepared by the Canadian Environmental Defence Fund for the Ministry of the Environment Ontario* (May, 1991) pp.22-23.

26. *Ibid*, pp.22-23.

27. *Ibid*, p.42.

28. *Ibid*, p.44.

29. *Ibid*, p.46.

30. *Ibid*, p.47.

31. *Ibid*, p.49.

32. In addition, there appear to be some differences between our figures and those presented in ONGA's (Ontario Natural Gas) submission (See ONGA, The Intervenor Funding Project Act in Matters Before the Ontario Energy Board: Considerations for the Future, - April 1992, Fig.1, p.6). The differences are due to the fact that EBRO 476 and EBRO 169 were included in ONGA's figures. There are further discrepancies because ONGA's included the cost awards for EBRO 462 and EBLO 234 in their calculation of the funding awarded under the IFPA. Finally, ONGA does not include other cases before the OEB not funded by ONGA.

## VI. ANALYSIS OF SUBMISSIONS

### A. Introduction

In this section we canvass the issues and their suggested resolution which surfaced in the submissions we received. As indicated earlier, an issues paper, also available in French, was drafted immediately after we were retained (see Appendix C). We wrote to more than 600 groups and individuals inviting submissions and including the issues paper. These names were generated from a list of all participants before the OEB, EAB and the Joint Board where there had been an application for intervenor funding and from suggestions by knowledgeable people and from our own information. Included in that list were 140 aboriginal groups and individuals since the Request for Proposals initiating this process asked that particular attention be given to the impact of the IFPA on aboriginals and other minorities.

In addition, we advertised in English and French newspapers across Ontario. The advertisement and the list of newspapers in which it was placed appears as Appendix D. Finally, we sent a letter to 385 community and minority newspapers, radio and television stations asking them to assist us in publicizing the project and our interest in receiving submissions.

As a result we received 90 responses. The submissions were broadly representative of a range of perspectives: individuals, interest and community groups, proponents and potential proponents, municipalities, government ministries, the Boards themselves. Needless to say, these responses have been invaluable and we are very grateful for the co-operation and effort they represent.

What we will attempt to do in this section is to present a summary of the issues raised in the submissions and the various perspectives brought to bear. This section is somewhat lengthy but we believe it is important to reflect directly the views of those who took the time and trouble, under quite severe time constraints, to respond to our request for submissions. In addition, this section allows the respondents, at least in some measure, access to the submissions of others. Our conclusions and recommendations regarding the questions in this section are presented in section VII and VIII below.

Unless otherwise indicated, all footnotes in this section are to submissions received by us and on file with the Ministry of the Attorney General, Policy Division. We attempted to make clear in our letter and advertisements that we would be referring directly to these submissions in the Report. In a few instances respondents placed some constraints on the extent to which we could quote from their submissions and in such cases we have respected these boundaries.

Finally, the EAB and the OEB were among those who responded and their recommendations will be discussed at appropriate places. However, because their roles are so central to the project their complete recommendations are presented in Appendix G.

## B. Advantages and Support for Intervenor Funding and Reservations About the Concept

The submissions expressed overwhelming, though not unanimous, support for intervenor funding and specifically the Intervenor Funding Project Act. Indeed, the prevailing assumption appears to be that the Act should continue and, therefore, most of the submissions focused on improvements to the Act and the process. Yet there is substantial disagreement on some points regarding how those improvements should be realized.

### i) Reservations About the Concept and Criticism of Funded Intervenors

There are essentially four reservations about the concept of intervenor funding. The first arises out of a belief that paying one's way is a necessary demonstration of commitment and entitlement to participate in the process. Expenditure of one's own funds both focuses participation and limits marginal and even irrelevant efforts. Without this pre-condition constraints against unfocussed and tenuous involvement are substantially loosened with the result that the disadvantages of such participation outweigh any benefits. This attitude is effectively summarized by Mr. Bruce Thom:[1]

> ... I don't like the concept. I freely admit that I approach the matter with a lawyer's bias. If you are going into civil litigation be prepared to pay if you lose. To lessen that onus through public funding is in my view to encourage more litigation
>
> ... I don't personally like the idea of the use of public money to fund opponents of public initiatives. The taxpayer ends up paying for everybody (and their expert witnesses).

Variations of this belief appeared in about five submissions.[2]

The second reservation concerns who the process actually benefits. Here the concern is that the laudable ideal behind intervenor funding - allowing those interests to participate when they otherwise could not - becomes skewed towards lawyers and consultants. Intervenor funding provides an economic incentive to these actors and, by design, provides professional opportunities that could not otherwise exist because of the intervenor's lack of funds. The apprehension is that lawyers and consultants with this economic incentive will seek out intervenors with only marginal concerns to apply for funding. If successful it is the experts not the clients who configure the interventions. Mark Mattson, Counsel to Energy Probe, has articulated these criticisms (he also expressed other reservations and advanced an alternative which we deal with below)[3]

> ...Organizations that would ordinarily not be involved in hearings are now finding themselves being approached by lawyers and consultants offering to put together an intervention for them...
>
> ...[O]rganizations that have a tangential concern with an area are becoming participants in sophisticated proceedings in which they may have very little expertise. The effect is to leave matters to their external experts, who then, in

> practice, persuade their clients (the organizations) to take particular positions at the hearing. The IFPA, we fear will all too often be funding the purposes and objects of the experts, not those of the organizations, as the IFPA had intended.

Susan McWilliams, solicitor for the Ontario Energy Board (expressing her own opinions) developed further the apprehension concerning the open-endedness of intervenors who are no longer constrained by their own budgets. Quoting from the Ontario Hydro Demand/Supply proceedings she observes:[4]

> The need to control the amount of time and money spent by an intervenor, its counsel, and its experts is recognized by Mr. Justice Saunders, the Chairman of the Hydro Demand/Supply Plan hearing. Mr. Justice Saunders recognized a basic flaw in the funding scheme under the IFPA is that the process is open ended and is not self-limiting:
>
> One of the things that you raised, one of the things that troubles me about all this, you talk about time availability. In any legal problem or any matter there is really no limit to how much time you can spend on it, if you want to. There is, and this hearing is no exception, you could literally spend the rest of your life hearing relevant evidence going to the issues here.
>
> So what has to happen, what does happen in the normal, in the private sector, be it litigation, be it any kind, you have to cut your cloth to what is available. And there is (sic) several functions. One is the function of time and the other is the function of cost. You have to conserve your energies for that purpose.
>
> But what bothers me a little bit about this process is there doesn't seem to be any way in which you can accomplish that. If in fact there is an open-ended method as to extent to which evidence can be presented, if it is relevant, and the ability for parties to claim costs for proper work done, how do you meet that problem in this particular context?
>
> In private sector litigation it is very easy. The parties themselves recognize that they can only spend so much time, and they govern themselves accordingly, so we don't have long trials. They are getting to be longer some of them now, but that is usually the way it is, and I just don't know how we can stress that particular problem.

More pointedly the then Deputy Minister of Energy, Marc Eliesen commented that the Ontario Hydro Demand/Supply Hearing could be viewed as a guaranteed annual income for funded intervenors:[5]

> I can say as an aside that certainly some have described what is taking place here as Ontario's first experiment with the guaranteed annual income, given the $21 million plus that has been awarded for those intervening and the many lawyers that will have great pleasure in participating over the next number of years.

Finally, one respondent believes that - rightly or wrongly - an application by him was expressly rejected because he was "a consultant in search of an intervenor group".[6]

The third reservation focuses upon the actual or potential impact upon "private" interests particularly as they become proponents. A. Dickinson, writing on behalf of the Association of Major Power Consumers in Ontario (AMPCO), observes[7]

> AMPCO does not quarrel with the intent of the Act since it is important that groups with legitimate concerns who have constructive suggestions are not prevented for (sic) presenting them because of financial constraints. However, the application of the Act has opened up something of a Pandora's box.
>
> While the objective was to inject some equity into the intervenor process, what has resulted is an entirely unintended outcome - that of proponents finding themselves at a substantial disadvantage as a result of the high level of funding being awarded to intervenors. As an example, the Environmental Assessment Board Awarded $21.5 million to 29 intervenors at Ontario Hydro's 25 year Demand/Supply Plan Hearing, many with very similar positions. This has resulted in AMPCO, the sole full-time representative of industry at the hearing, facing this massive group of well-funded intervenors while having to finance its own activity out of very limited resources. Clearly, in this situation a new type of inequity has been created.

George Davies, the Deputy Minister of Energy, while stating that "[t]he Ministry of Energy is a strong advocate of public interest representation at regulatory hearings in which energy issues are addressed,"[8] nevertheless, entered some cautions including that:[9]

> [t]he intervenor funding process should not be permitted to evolve to the point where proponents would abandon worthwhile projects rather than incur large front end regulatory costs. This is of particular concern where small scale private projects such as small hydro electric generation or cogeneration are involved. Intervenor funding should not become automatic. Periodic reviews of the process, such as this one, should be conducted.

The fourth reservation challenges the effectiveness of such participation itself particularly when weighed against the costs. J.C. Butler a former Vice-Chair of the Ontario Energy Board concludes[10]:

> I believe, therefore, that the purpose of the IFP was to ensure that those who would be affected by a decision of the Board would not be denied the opportunity to mount an effective intervention before that Board through lack of funds. I certainly support that objective, but am of the opinion that the IFP appears to have fallen short of that objective.
>
> Since the majority of my experience with intervenor funding and cost awards has been with the OEB, most of the following comments are based on that experience, both before and subsequent to the introduction of the IFP.
>
> The availability of funding has certainly increased the level of participation in many hearings, but unfortunately, although the required input has been achieved in some hearings, in many cases the increased interventions are from interest groups and not from the public that are directly affected by the application. For example, the level of activity of Energy Probe, Pollution Probe and other such coalitions and pressure groups has certainly increased, but these groups are not directly affected by most applications and usually they are not able to speak for those that are.
>
> IFP has certainly affected the hearing process, generally resulting in extending the overall process by as much as several weeks. There is the initial time for the intervenor funding hearing, possibly an extension of the time between the award of funding and the hearing to accommodate preparation of the intervenors evidence, and several additional hearing days may be required to deal with the increased interventions. These delays can be very expensive to an applicant through loss of revenue, delay of construction or for other reasons.
>
> As noted above, there have been cases where the intervention(s) supported by the IFP has contributed to an

> improvement in the quality of decisions, but the majority of the funds spent have had only a marginal impact on the quality of the decisions.

ii) Complexity and Adversariness and Dominance of Lawyers

Despite efforts to publicize the Act and the process concerning intervenor funding a substantial number of submissions emphasized its inaccessibility to the public. Many of the submissions indicated that citizens otherwise articulate and knowledgeable concerning relevant issues, were quite confounded by the process. Karl Braeker of the Ontario Federation of Agriculture puts the point this way:[11]

> The existence of this legislation is not widely known. For it to be effective, it MUST be made known to ANY intervenors, aboriginals, minorities or individuals. Eligibility can be decided later, but presently this legislation appears to be shrouded in a cloud of secrecy. The lawyer for the farmers fighting for the golf course, [an issue discussed elsewhere in the submission] for instance, did NOT know about the Intervenor Funding Act.

Many aboriginal groups and those associated with them indicated that they had never heard of the Act.

Linked to ignorance of the process and its inaccessibility were comments about lawyers who were depicted, in some submissions, as dominating the proceedings beyond the intervenor funding process itself. The submissions from groups and individuals frequently did not draw neat distinctions between intervenor funding applications and other parts of the process, particularly concerning the issues we are discussing in this subsection.

In these depictions, lawyers prolong the process, make it more complex and adversarial so that acceptable compromises are difficult, if not impossible, to work out. A submission on behalf of a citizens group, WASTE NOT asserts:[12]

> If the Environmental Assessment Board were truly interested in facts the lawyers are not necessary. The proponent and intervenors can state facts to the Board...[T]he lawyers did not attempt to facilitate communication over the issue but instead widened the gap between the city and its citizens.

> ...We would, in future, apply for funding for "experts" -not for a lawyer! In our opinion - no lawyers should be allowed at all!

Closely linked to the claim that the process is dominated by lawyers making it adversarial and costly, including the process for intervenor funding, is a repeated plea that the Boards devise processes which are more settlement-oriented and cooperative in nature. The submission of Citizens Acting Now (CAN) observes:[13]

> Anyone who has difficulty with the language, understanding the legal system, or has a limited amount of money is at a disadvantage in the hearing process. The IFP Act may allow minority groups to become involved, but funding will not likely match those set out by the proponent...The only way I see that this could be avoided is to allow for a round table process which is less threatening and welcomes a sharing of ideas and solutions rather than a win/lose situation.

Of course, it is not part of our task to provide opinions on the overall processes of the Boards. But the dissatisfaction with the confrontational aspects and perception about lawyers particularly as they are relevant to intervenor funding is an aspect we will return to.

### iii) Advantages and Effectiveness of Intervenor Funding

As was indicated, support for the Intervenor Funding Project Act is very strong. Despite the reservations, just discussed, enthusiasm for the concept, tempered by suggestions for responding to its weaknesses, were typical of the responses. The IFPA's capacity for providing access and a voice for legitimate interests that simply would not be able to participate, or participate in a significantly modified way, are themes that run throughout the majority of the submissions even while acknowledging these issues need to be judged from a number of perspectives.[14]

A citizens' group, Greensville Against Serious Pollution (G.A.S.P.), asserts:[15]

> No government agency can substitute for concerned citizens watching their own neighbourhoods. But with a large

> proposal, "watching" entails more than standing at the window and looking out. It entails a substantial expenditure of time and money plus expertise - expertise that usually must be hired, at the expenditure of yet more money. Citizens in an area are not likely to have enough money to do this. They must be given funds.
>
> Getting them funds is also efficient for government. Citizens' groups are staffed by concerned volunteers working out of their kitchens, not paid public servants working out of offices. No government agency comes even close to a citizens' group in the assiduousness and efficiency with which they watch their turf.
>
> One proof of this is just how much of a nuisance for the Ministry of the Environment a group of concerned citizens can be. A large part of this "nuisance" is that citizens groups insist on pointing out things that bureaucrats do not have the time to see.

David Poch, Counsel for the Coalition of Environmental Groups and Council of Canadians and former counsel for Energy Probe in various hearings, describes the impact of intervenor funding not only upon groups, who are provided with greatly enhanced opportunities to participate, but upon the process as well:[16]

> Clearly the quality and breadth of public interest intervenor participation before both Boards has been enhanced by the IFPA. For example, Energy Probe had seldom if ever before been able to offer the OEB the expertise of professionals other than in-house experts. The Council of Canadians would not have been in a position to attend the British Gas hearings on a full time basis without funding, despite the direct link between the foreign takeover issues being considered and the mandate of the Council.
>
> In several cases the OEB has relied upon funded expert evidence to make recommendations that have multi-million dollar implications.
>
> In the context of the EA Act, the Coalition of Environmental Groups is in the process of assembling an integrated case in opposition to Ontario Hydro's 25 year plan. Without such expertise it would be virtually impossible to offer alternatives of sufficient detail and credibility that the Board could rely upon them. It would not be in the public interest to embark upon a multi-year hearing with the only possible outcomes being acceptance of some version similar

> to the proponent's view or dismissal of the application. The provision of funding allows intervenors to offer the Board broader alternatives which can be recommended to the proponent for adoption or offered to government along-side with a rejection of the proponent's view. Thus the risk of a "wasted" hearing (in this case a $100 million hearing considering plans involving $60 to 200 billion) is reduced."

These conclusions are echoed by Nancy Kleer on behalf of the aboriginal clients she represents:[17]

> I am representing the Moose River/James Bay Coalition and the "Coalition" of Nishnawbe-Aski Nation/Grand Council Treaty #3/Teme-Augama Anishnabai in the Ontario Hydro Demand/Supply Plan hearings. As you are aware, both these parties have received substantial intervenor funding pursuant to the Intervenor Funding Project Act. Without that funding it would have been impossible for them to contribute to the hearing and to have their interests and concerns dealt with. For that reason alone, it is absolutely critical that intervenor funding continue in some form or another.

Such support did not only come from community and public interest groups. Peter Staadecker on behalf of ICI Nitrogen Products had some criticisms of Intervenor Funding, among others, suggesting that it be distributed only to those who will risk some of their own funds. Nevertheless, he concludes that "the intent of the intervenor funding is laudable. Intervenor funds should be available to an intervenor with a demonstrably serious interest in a given hearing and a genuine need for funds."[18]

The Ontario Natural Gas Association (ONGA-Consumers, Union, Centra) makes a number of recommendations - dealt with subsequently - concerning qualifications it expresses regarding the IFPA. Nonetheless, ONGA is "...of the view that these concerns can be alleviated by making specific changes to the current IFPA".[19]

Heather Campbell, Counsel, Ministry of the Environment, responding on behalf of the Legal Services Branch from that Ministry, states " [I]n a general sense, both intervenors and Boards have indicated that the quality of decision has been affected positively with the input of public interest groups made possible through the Intervenor Funding Project Act."[20]

Ontario Hydro "supports the spirit and intent of the legislation" making the following range of comments (in responding to specific questions raised in our Issues Paper):[21]

> Intervenors have received funds which have increased their ability to take part in the hearings process. In the DSP case these funds have provided a broad capability to review Hydro's plans. In the OEB's case the funds provided have for the most part reflected the review of rates and been limited to the review of targeted issues.
>
> ...Funding has enabled in depth participation by a wide range of groups. Given the nature of the DSP hearing, this is not inappropriate. One possible concern is that funding has led to the examination in greater detail than is necessary for the approval requested. Inevitably, this is a matter on which there could be reasonable differences of opinion.
>
> It is too early, from Ontario Hydro's perspective, to comment on the effect of the IFPA on EAB decisions since there have been none to date. With regard to OEB decisions it has not been Hydro's experience that a significant change in the quality of recommendation has resulted, nor has the quality or content of intervenor submissions altered substantially.
>
> With respect to OEB matters the Act's benefit is that it provides funding to parties that have legitimate concerns to express early in the process so that these parties may participate effectively in the hearing.

Both the present Attorney General and his officials[22] have indicated their support for the Act. Mr. Hampton, in announcing this study, stated:[23]

> [T]he objective of this legislation is a worthy one. It increases public access to administrative decision making and ensures that tribunals have the benefit of all relevant view points and information so decisions can be made in a fully informed basis. As well, the legislation ensures that the ability of a party to intervene is based on the importance of the issues it can raise, not its financial position.

Finally, both the EAB and the OEB while making a number of recommendations concerning altering the IFPA (dealt with below) are strongly supportive of it.

The EAB states:[24]

> The EAB agrees with the purpose of the IFPA and supports the establishment of intervenor funding as a permanent part of the legislative scheme for assisting public interest intervenors to participate in hearings before certain boards. In the Board's view, the IFPA has successfully regularized the former *ad hoc* system of providing financial assistance. The provision of funding has generally benefitted Board hearings by enabling intervenors to participate and to participate effectively in the process by presenting their views, as well as expert advice, on issues that affect the public interest.

The OEB observes:[25]

> One of the major advantages of the Act is that it has encouraged new intervenors in the rate setting process and has also set up the expectation on the part of the Board that some of those can now come forward with quite sophisticated, responsible interventions at a reasonable cost. This potential for new ideas is welcomed by the Board as it benefits the utility customers who pay for the intervention and allows for more acceptance of the Board's ultimate decision.

## C. Other Models and Expansion to Other Tribunals

This sub-section addresses other issues raised in the submissions that are external to evaluating the existing intervenor funding process itself, that is, (i) whether yet another funding model should be adopted and (ii) whether the existing process should be expanded in some way to cover other tribunals.

### i) Other Models

On the whole there were few submissions that seriously advanced alternatives to the Intervenor Funding Project Act. As indicated most submissions strongly supported the Act and then focused upon ways to improve it, in some instances, involving substantial modifications. The alternatives that did appear are: (1) abolition of intervenor funding in favour of a costs regime; (2) abolition of intervenor funding in favour of some kind of public advocacy office; and, (3) retention of intervenor funding but paid, not by the proponent, but by some fund of public money.

a) Funding Based Exclusively on a Costs Regime

Energy Probe advocates abolishing intervenor funding in favour of a re-vamped and expanded regime of costs.[26] The individual criticisms of intervenor funding by Energy Probe leading to this recommended overhaul will be dealt with at appropriate places in this section.[27] However in summary form they are:

a) The IFPA skews control of interventions toward lawyers and consultants and also skews hearings toward the interests of these lawyers and consultants.

b) The coalition-forming provisions of the IFPA all but guarantee that public interest concerns are deleted at the hearing, weakening the intervention and diminishing its value.

c) The IFPA encourages parties to adopt artificial positions to differentiate themselves from other parties, and so qualify for funding.

d) The proponent is too influential in the funding panel procedures.

e) The funding panel represents an additional step that encumbers the hearing while compromising some parties.

f) The possibility of IFPA awards in excess of the cost award could place organizations in jeopardy of bankruptcy.

As a result of these criticisms Energy Probe advocates that "an improved costs procedure" replace intervenor funding awards. Under this regime full costs would be "available to all responsible interventions". This regime would include the awarding of "interim costs" which:

> if available at all hearings and guaranteed for work that was relevant and ably executed, would for most intervenors eliminate altogether the need for IFPA awards while providing them with continual feedback, acting as an accountability method ensuring that ratepayers funds were being well spent.

Energy Probe recognizes there would be instances where organizations have so few resources that they could not initiate the intervention under this regime. If such were the case "a motion could be made for this purpose, and could be granted to meet disbursements, possibly including those of lawyers and consultants who required prepayment." But in any event, this hurdle should be seen as a strength not as a weakness of the proposal:

> In most cases the need for advance costs would stem from circumstances where the lawyers and consultants the intervenor would wish to hire do not have confidence in their proposed client's ability to mount a worthwhile intervention, or in their clients' judgement as to what information the hearing panel would consider worthwhile. By so putting an onus on intervenors to convince their own contractees of the merits of their position, society would be erecting a minimal but necessary hurdle to ensure that organizations are drawn to hearings not because the hearings are there and self-funding, but because those hearings are vital to the organizations own interests.

This proposal or any variation of it does not appear in any other submission nor are we aware of any other support for it. (There may, however, be some affinity in effect between the recommendations of Energy Probe and the OEB's recommendations dealt with below). On the other hand, without specifically referring to the Energy Probe proposal, the Consumers' Association of Canada (Ontario) specifically indicated its preference for intervenor funding as opposed to an exclusive cost award structure:[28]

> CAC (Ontario) is supportive of the Intervenor Funding Project Act, 1988 (the Act) and certainly it enables us, as a non-profit volunteer group, to participate more readily than a "cost award" system would. Our experience has been that it is difficult to obtain "seed" money to begin an intervention, and in the absence of contingency fees or other such mechanisms we are dependent on the goodwill of the legal firms we contact.

### b) Intervenors Represented by Public Interest Advocates

At least two relevant documents referred to some sort of funded public interest advocacy office as an alternative to intervenor funding. Comments by both the Public Interest Advocacy Centre (PIAC)[29] and the Consumers' Association of Canada (Ontario)[30] pointed to the Manitoba Public Interest Department which is established within the legal aid program to conduct public interest litigation. This model was discussed earlier in the Report (sec. III.D).

Both PIAC and the Consumers' Association, after raising this alternative, reject it principally on the grounds that intervenor funding leaves more control with the particular intervenor and because it leaves financial responsibility with those most directly involved with the proposed project being scrutinized, the proponent. PIAC asserts:[31]

> A Public Interest Department within legal aid tends to put public interest litigation in a relationship of groups on the state's largesse. The IFPA-based approach empowers public interest groups since they retain control of their agenda and organize the nature and role of their participation in the regulatory process within the constraint of satisfying the funding criteria. Moreover, the IFPA-based approach minimizes reliance on the public purse, since from the outset intervenor funding comes from the funding proponent, which may be a public body but is often a private utility operating under a government grant of a monopoly.

Apart from the lack of support for the "Manitoba Model" by those who referred to it we would also observe that very recently the Law Society of Upper Canada has approved a Report that recommended the Ontario Legal Aid Plan cease funding certificates in environmental matters because of the burden they impose. It, nevertheless, did recommend funding through the Intervenor Funding Project Act or some other mechanism for such cases.[32]

### c) Intervenor Funding Paid For By Some Public Fund Rather Than By the Proponent

This alternative would involve setting up some public fund to pay for interventions. Unlike a legal aid scheme the appropriate Board would still make the funding decisions but unlike the present scheme a general fund and not any specific proponent would be financially responsible.

This model and variations of it were advanced primarily by those responding to the Ministry of Environment's EA Task Force's discussion paper Towards Improving the Environmental Assessment Program in Ontario.[33] That paper, the consultation process around it and its assistance to this study have been described earlier (sec I.D.). Briefly, the Task Force recommended the possibility of early funding to the public during the planning and consultation phase of the environmental assessment and that funding, if any, be taken account of in any decisions under IFPA.

Several of the responses to these recommendations[34] supported early funding but - and that is what is important here - they suggested that a public fund which might or might not impose a charge upon the proponent be established to provide such funding. There appear to be two main reasons for this suggestion. First, it would make application of the process to "private" proponents more palatable since they would not bear the costs of such public participation (or to a lesser degree if some charge were levied by the funding authority). Second, it would make funding possible where the proponent (whether public or private) could not afford (however judged) the costs of such participation.

Nevertheless, the model was also raised explicitly in a submission to us by the Association of Major Powers Consumers of Ontario (AMPCO) that argued the need to[35]:

> Examine the feasibility of having the Ministry responsible for the particular jurisdictional area fund intervenors. This would force a more rigid discipline on the funding process and ensure that proponents aren't forced to participate in an unnecessarily prolonged review with the associated enormous costs. Basically the question is, who should pay? We believe the present approach burdens a business sector already under tremendous cost pressures. By diverting the responsibility onto government, taxpayers will be able to see just how onerous this burden is and there will be pressure to streamline the process.

### ii) Expansion to Other Tribunals

The issue of expansion of intervenor funding to other areas was not specifically part of our assignment. Nevertheless, about fifteen submissions dealt with expanding essentially the present scheme to other tribunals. One commented that there was "no logical reason why the Act should not apply to any administrative tribunal dealing with public interest issues."[36]
Others were not as far reaching with most addressing applications to the Ontario Municipal Board[37] and somewhat fewer dealing with the Environmental Appeal Board.[38]

The Ontario Municipal Board, (OMB), is already subject to the IFPA but only to the extent that its jurisdiction and members are involved in Joint Board proceedings that raise issues under environmental statutes. From that perspective it would seem a small step to have all OMB proceedings covered. On the other hand, there are a range of proceedings at the OMB in which proponents can range from individual homeowners to municipalities to corporations with substantial development interests. The Canadian Bar Association (Ontario) (CBAO) in responding to an earlier consultant's report on the OMB which had, in dealing with many issues, recommended expansion of intervenor funding to the OMB, stated[39]:

> While the CBAO does not object to the concept of intervenor funding, the present provincial intervenor funding scheme would be most unworkable at the OMB. Unlike the Environmental Assessment Board, proponents at the OMB are often individual citizens, underfunded providers of non-profit housing or other persons who have very limited financial resources and should not be required to provide funding to intervenors. Intervenor funding can only work in certain limited circumstances at the OMB. Detailed study and consultation with interested parties would be required in order to devise a scheme of intervenor funding that could be equitably and effectively instituted at the OMB. The CBAO would strongly oppose applying the present intervenor funding at the OMB.

Similar concerns were echoed in the submission we received from some members of the Ontario Municipal Board.[40] Moreover, in further correspondence made available to us, the Chair of the

OMB, John Kruger, raised questions including the backlog at that Board, who would pay for funding and who should decide eligibility. He concludes:[41]

> As a Board we are not against the concept of intervenor funding for we understand it and have dealt with it in joint board hearings. For the approximately 20 odd cases indicated in the discussion paper, [attached to letter; "20 odd cases" are "substantive official plan referrals and matters connected to such referrals"] intervenor funding is appropriate. However, beyond these cases we see great difficulty in administering intervenor funding. With no attempt at understatement, intervenor funding in these latter cases would be a financial and procedural disaster and in the end would add no substance to the fairness of the decisions the Board already adjudicates.

The main discussion of extension of intervenor funding to the Environmental Appeal Board comes from the Report Regarding Environmental Cases to the Legal Aid Committee by the Group Applications and Test Cases Sub-Committee, of the Ontario Legal Aid Plan, described earlier.[42] The case for such expansion, but also the difficulties in doing so, are succinctly articulated:[43]

> In these cases, the party bringing the appeal is a private party. For example, a company has been ordered pursuant to the Environmental Protection Act to clean up its worksite that has become polluted over the years and poses a health risk to the community.
>
> The company chooses to appeal the Order to the Environmental Appeal Board.
>
> The Board hears appeals from the decisions of a Director, as appointed pursuant to Section 4 of the Environmental Protection Act. Directors have extensive powers to issue administrative orders such as stop orders, control orders, limiting emissions and discharges, approvals with respect to, for example, air emissions and clean-up orders. Any person to whom an order of the Director is directed may appeal to the Environmental Appeal Board.
>
> At the conclusion of the hearing, the Board has no jurisdiction to compensate the parties for their costs. Nor is initial funding available under the Intervenor Funding Project Act.
>
> Many cases now coming before the Environmental Appeal Board,

> particularly those dealing with clean-up orders are of significant public interest. The Environmental Appeal Board is also naming parties that are groups representing the public interest.
>
> Consequently, it seems desirable that in those cases funding be provided of the same type as under the IFPA for those matters that are of significant public interest where the Board has named an interest group as a party.
>
> The most useful way to provide this funding would be through amendments to the IFPA. That would provide both a screening mechanism to ensure that only appropriate parties are funded for appropriate amounts and a method to ensure that the expenditure of funds is properly monitored.
>
> One significant difficulty, however, in placing matters before the Environmental Appeal Board under the IFPA is the nature of the funding proponent. There is no jurisdiction in the IFPA to permit the award of funds to be made from general revenues of the Provincial Government rather than from the Board, there would be some concern regarding the possible prejudice to the right of appeal of someone subject to a Director's Order by the threat of being required to provide intervenor funding. Careful attention to the proposed amendments would be required to ensure that no such prejudice could occur.

Finally, the submission of Heather Campbell, Counsel to the Ministry of the Environment, cautiously suggests expansion-not to any specific tribunal-but rather on a case-by case basis:[44]

> Extension of intervenor funding to other proceedings carries with it the danger of further complicating and lengthening the hearing process. However, consideration should be given to allowing intervenors to argue that in cases where the IFPA would not normally apply, special circumstances of a particular case may permit the extension of funding to that case. Careful examination must be given to this issue as the cost and time implications with respect to extension to the Ontario Municipal Board, for example, could be tremendous. Furthermore, extension to proceedings which may, in the future, allow more access to members of the public may also have serious time and monetary consequences.

### D. Existing and Potential Differences Between the EAB and OEB

As indicated earlier the jurisdiction of the OEB and the EAB are quite different. This suggests that there could be other important differences relevant to how the IFPA has been implemented by each of them. Two documents[45] pointed to why the EAB/JB and OEB may need to be considered separately regarding at least two issues. Further, we will shortly come to a series of questions on which the Boards take substantially different positions.

The first issue is the difference in kinds of issues entertained by each Board and their complexity and the length of time required to deal with them. In this regard the EAB would appear to have the more diverse and complicated task. Susan McWilliams, Counsel to the OEB observes:[46]

> Already the experience with the IFPA shows that the problems confronting the Environmental Assessment Board are far greater than those of the OEB. This may largely be due to the fact that the issues and the extent of the inquiry before the OEB are more predictable than the Environmental Assessment Board. The OEB is largely concerned with matters relating to the energy industry such as natural gas rates, gas franchises, construction of pipelines, gas storage and development, and reviews of Ontario Hydro's electricity rates. In contrast, the Environmental Assessment Board deals with environmental problems which are quite different in each proceeding and concern issues which are often so wide as to defy limitation. Dealing as they do with the protection of the quality of life, it could be said that some of the more extreme funding applicants seek to establish a heaven on earth. This invites endless discussion and debate which a tribunal composed of mere mortals can hardly attempt to resolve. As a result, the magnitude of the hearings, number of intervenors, and the amount of funding awarded differ. Whereas an Environmental Assessment Board hearing may last for two years, an OEB rate hearing may be three to four weeks, and a pipeline construction hearing one week.

Similar differences are reflected in the submission of David Poch.[47]

The second issue concerns the presence of a staff at the OEB that participates in hearings to represent the public interest. There is no comparable counterpart at the EAB. More specifically, the question arises of how this staff and its role affects the OEB's treatment of applications by intervenors for funding. Again, let us quote Susan McWilliams:[48]

> An interesting issue is posed by the duplication that may result from evidence of witnesses retained by the OEB's staff who intervenes as an independent party to the proceedings and that of witnesses proposed for funding by the intervenors. On occasion, the Board has limited the funding for certain experts on the grounds that it was unnecessary and would only duplicate the evidence of experts retained by Board staff.

It is unclear to what extent this difference has influenced the OEB in its awards but there is certainly a perception that there is a marked difference between the two Boards in how, generally, they approach their tasks. Later, in this section, where issues like the criteria for funding, the level of funding, and the relationship between intervenor funding and cost issues are dealt with, these differences will be discussed at length. But they are so central let us quote here an overarching analysis provided by David Poch:[49]

> The OEB has seriously curtailed the opportunities provided by the Act. The EAB has done a better job but some problems remain.
>
> In particular, the OEB has made several decisions which appear to be quite contrary to the intent of the Act and, if followed in the future, may render the value of the Act in the OEB setting virtually nil.
>
> In the H.R. 19 case (the case hearing respecting Hydro's 1991 rates) the OEB made several "general findings". These findings: a) limited awards to 75% of the level found reasonable (which forced the withdrawal or scaling back of public interest group interventions) and b) sought to force the combined representation of intervenors with disparate interests ( which effectively created second class intervenors who had no guarantee of ongoing representation).
>
> Since the time of the H.R. 19 funding decision, the OEB has compounded the problem with at least two other poor decisions. First, in the British Gas case (E.B.R.L.G. 35) the Board, while providing funding, suggested that frequent intervenors, like Energy Probe, should be able to budget their own funds for upcoming cases and rely upon the possibility of receiving a favourable cost award (OEB decision June 12, 1990 at paragraph 3.1.18 to 3.1.20). This ignores the realities of public interest group financing and fundraising versus the extraordinary costs of interventions --the very reason for the Act. (Indeed the inclusion of section 7(2)(e) which asks the funding panel to

consider whether the "intervenor has an established record of concern for and commitment to the interest" suggests that the legislature specifically contemplated groups with ongoing involvement being assisted.) Second, in the assessment of costs in the H.R. 18 case respecting Hydro's 1990 rates (which was not finalized until after the start of the H.R. 19 hearings a year later) the Board took the position that an ultimate cost award that is lower than the IFPA funding level which occurred for IPPSO in that case meant intervenors would have to return funds spent. This would mean that intervenors who do receive an IFPA award must continue to gamble on a cost award -- again a bar to participation that the Act is intended to remove. The Act should be clarified to preclude these bars to its full application.

In contrast, the EAB in the DSP case has gone to considerable lengths to overcome the Act's potential shortcomings. In the context of this extremely complex and lengthy case, the Funding Panel, quite helpfully, staged funding to allow eligible groups to develop their full applications. (This approach should be specifically allowed in an amended version of the Act). The principal hurdle encountered by sophisticated intervenors in the DSP case was the unavoidable need to educate the Board, who had never before dealt with the complex technical issues in this case, to the need for highly complex and expensive analyses. This difficulty is eased by the two stage process which allows the presentation of fuller expert proposals and submissions. In the D/SP case the novelty of the funding process added to the Board's difficulties in dealing with the numerous applications quickly. In a large case such as the D/SP, the nine month process might be compressed to 4 or 5 if guidelines are provided at an early date to applicants and if the funding panel were larger.

## E. Specific Issues Requiring Possible Modification to IFPA

In this section specific issues appearing in the submissions and related documents that assume the retention of the IFPA but which might require some modification either to the Act itself or in the way it is being implemented at present are discussed. Nevertheless, it should be noted at the outset that some of these recommendations would drastically alter the IFPA. Let us repeat that, while the recommendations of the OEB and EAB will be discussed at appropriate places, a complete set of their recommendations appear in Appendix G.

### i) Decision Maker

The EAB makes several recommendations but two deal with what it describes as "fundamental issues". The first of these is "the choice of decision maker". The EAB's recommendation is that an independent funding agency should decide both initial and supplementary funding issues. If this recommendation is not accepted the EAB would then prefer that the "responsibility for both initial and supplementary funding decisions should be assigned to the hearing Board". Because the EAB's proposal would involve substantial change and because it regards the issues as fundamental we will quote at some length:[50]

> In the existing legislative scheme, a funding panel is charged with the responsibility of determining the initial funding entitlement of intervenors, once status has been determined by the hearing Board. The hearing Board makes decisions respecting supplementary funding.
>
> The EAB questions whether this is the best scheme. Should the funding panel have the responsibility for supplementary funding too? Or should the hearing panel make all of the funding decisions? Alternatively, should an independent agency be established to make all funding decisions and to administer funding programs?
>
> The primary advantage of having the funding panel make all of the funding decisions, initial and supplementary, is that this would remove the appearance that the hearing Board could influence the course of the hearing through decisions on funding. One of the disadvantages of this alternative, however, is that the funding panel cannot determine the issues to be addressed at the hearing nor the relevance of some of the proposed research and evidence to be called. In addition, the funding panel, for supplementary funding decisions, would not have first-hand knowledge of the progress and the focus of the hearing.
>
> The major advantage of having the hearing Board make all of the funding decisions, initial and supplementary, is that it could decide upon the issues first and base its initial funding decision on assuring representation of these. The hearing Board would also have the advantage of being able to assess on an ongoing basis, various intervenors' needs and contributions to the hearing as circumstances change. The major disadvantage of this approach is the possible perception of bias dealing with the substantive issues in the hearing if funding decisions made by the hearing panel

> substantially affected the list of issues to be presented.
>
> The establishment of an independent intervenor funding agency would obviously save time, money and effort. Of more importance, an agency that made funding decisions for all types of administrative tribunals would develop expertise and procedures for the efficient and consistent granting and administration of funds. The major disadvantage of this approach would be that an independent agency might not be aware of the kinds of issues likely to arise at the various types of hearings for which intervenor funding is provided. However, the agency could be comprised of people with appropriate backgrounds and training to overcome this difficulty.
>
> The Board is of the view that the existing legislative regime is unsatisfactory. It has proven extremely difficult to establish a consistent, predictable application of the IFPA when initial funding decisions are made by one panel and supplementary decisions are made by another. In addition, the proper administration and supervision of funding programs (in excess of $30 million) is a burden that requires resources substantially greater than the human and financial resources available to the Board and distinctly different from the resources generally required by the Board to fulfil its legislative mandate.
>
> The Board has discussed the alternative approaches that are described above at great length. The establishment of an independent intervenor funding agency is the preferred alternative of the majority of Board members. If this alternative is not acceptable, then the Board recommends that the responsibility for both initial and supplementary funding decisions should be assigned to the hearing Board.
>
> **Recommendation 1**
> That the amended *Intervenor Funding Act* should provide for the establishment of an independent funding agency to decide on both initial and supplementary intervenor funding applications and to administer all intervenor funding.

The OEB focuses upon what would be the second alternative of the EAB, that is, funding hearings heard by the main panel. The OEB recommends this with the qualification that the Chair, in her discretion, could require a separate funding panel. It states:[51]

> It is the Board's opinion that, at least in front of the OEB, funding is so accepted and commonplace that it is considered simply a preliminary step in the routine

> regulation process.
>
> The mischief (or the appearance of such) that a separate and independent funding hearing was designed to thwart, simply does not exist and the process could be made simpler if there was provision for the panel hearing the main case, to sit as the funding panel.
>
> The separation of the funding issues from the issues in the main case was designed to ensure impartiality. When the then Chair of the Board, Robert W. Macaulay, prepared his February 17, 1987 memo to the Attorney General on intervenor funding (on which much of the present Act is based) it was anticipated that this impartiality was necessary for a fair hearing of the funding issues. That memo is attached as Schedule 2 to these comments.
>
> At this stage in the history of funding, the issues are different. They no longer involve the introduction of funding principles to uninitiated and sometimes doubting funding proponents and Board members. The system works and could work better if there was a melding of the funding decision makers and the actual hearing members particularly in light of the necessity for funding decisions to be based on an issues list prepared by the main panel.
>
> It is submitted that the process has matured considerably since the days of ad hoc gratuitous funding and the present entrenchment of the Act's principles in the regulatory process makes this caution of separate panels unnecessary and cumbersome.
>
> **Recommendation 11:**
> Any new funding legislation should contain a provision whereby, at the discretion of the Chair, any hearing required to decide a funding application may be by a panel other than the panel hearing the main case.

A substantially similar position regarding funding applications being heard by the main panel is taken by Ontario Hydro.[52]

In addition, both Boards recommend that, in case applications are to be heard by funding panels comprised of Board members, the Board should have the capability to name more than one member in order to deal with numerous or complex funding issues.[53]

### ii) Flexibility Regarding Oral Hearings

The EAB,[54] OEB[55] and Ontario Hydro[56] all recommend that oral hearings be dispensed with in some instances when dealing with funding issues. The EAB deal with the questions most fully so we will quote from that submission:[57]

> In the Board's view, the IFPA requires a hearing only in the event that the proponent objects to being named as the "funding proponent". If the proponent does not object, a hearing is not mandatory for every intervenor funding decision.
>
> The Native Council of Canada (NCC) appealed the Stage 1 decision of the DSP funding panel wherein funding was denied to NCC. NCC based its appeal, in part, on its contention that the *Statutory Powers Procedures Act* (SPPA) applies to the deliberations of a funding panel established pursuant to the IFPA and that a hearing is mandatory. The NCC also took the position that the SPPA would require an automatic stay of proceedings until the appeal has been decided or until leave to lift the stay had been given.
>
> In response to the NCC appeal, the Ontario Court of Justice (General Division) directed the funding panel to provide an opportunity for NCC to make additional submissions. However, the Court found no authority for the proposition that the panel had a duty to grant an oral hearing.
>
> The Board is of the view that, in many cases, it can obtain the information it requires to make a funding decision through the vehicle of a comprehensive application form. Funding panels are moving toward a more informal approach in order that the panel and Board staff may work as facilitators to encourage and assist parties to build coalitions, to co-ordinate their cases, and to reduce duplication of study and the preparation and presentation of evidence.
>
> There are, of course, instances where a hearing may still be preferred but the Board believes that the provisions of the Act should allow the Board to retain this flexibility.
>
> With respect to supplementary funding applications, the Board is of the view that a hearing is not necessary in all cases. The OWMC hearing Board ruled that a supplementary funding hearing, in its case, was required. The DSP hearing Board has ruled that generally supplementary funding hearings will not be held (see Appendix A). The funding panel, under the aegis of the third order-in-council for funding in the Timber Management hearing (similar to a

> supplementary funding case in some respects), ruled that a full-blown court-like hearing was not required (see Appendix C)
>
> **Recommendation 5**
> a)That the amended *Intervenor Funding Act* clearly indicate that the *Statutory Powers Procedure Act* does not apply and that a hearing is not mandatory for every intervenor funding decision or for decisions regarding applications for supplementary funding.

In contrast, the Public Advocacy Centre argues that the SPPA should apply.[58]

> **The appeal provision should be retained. However elsewhere in the Act there should be an explicit statement that the Statutory Powers Procedure Act applied (sic) to the determination of an original award. In addition, this procedural provision should incorporate the provisions of section 10 of IFPA.**
>
> This would unequivocally imply that hearings are required for funding decisions. Further, it would also provide that, upon appeal, there was an automatic stay unless leave to lift the stay were granted in accordance with the SPPA. As noted, however, this procedural provision should make it clear that the procedures to be used may be less formal than those used in other proceedings of the board. In particular, panels determining funding applications may be left with a broad discretion in setting the appropriate procedures. It might also state that the main hearing panel need not hold a hearing when determining supplementary funding awards as these applications are more to the administrative end of a continuum of procedural requirements. This continuum ranges from a requirement to be quasi-judicial down to a requirement to be fair...

### iii) Naming of Proponent

The OEB has some concerns about the definition of proponent as it applies to its hearings of a generic nature:[59]

The definition of proponent in Section 1 of the Act states that:

> "proponent" means a party whose undertaking, in the opinion of a funding panel, is the subject matter of the hearing or another party or individual or corporation who, in the opinion of the funding panel, is potentially a major financial beneficiary of the decision of the board.

> The Board is concerned that the definition does not cover hearings of a generic nature which are called on the Board's own motion to deal with topics like the transportation of gas and the role of brokers or the Board's draft rules of Practice and Procedure etc. The word proponent may not be wide enough to cover funding for these hearings and it should be expanded.
>
> In the Consolidated Hearings Act and the Environmental Assessment Act, the word undertaking in the definition is taken as the specific project (or undertaking) under review. Within the context of this Board, however, the word would be given a much wider definition to cover the purpose of the company itself, ie. the "undertaking" of distributing natural gas in Ontario.
>
> As well, it can be easily argued that the latter part of the definition dealing with the financial beneficiary, may not cover the utilities because they may not benefit from the results of the hearing (ie. maybe only the customers would benefit, not the shareholders).
>
> This could result in a problem because the Board normally declares the utilities as funding proponents in spite of the ambiguity. To date there has not been a problem but the Board can see instances where the issue could arise.
>
> **Recommendation 5:**
> The definition of proponent should be expanded to permit the Board to name utilities as proponents in the event that the Board calls a generic hearing on its own motion.

### iv) Early Funding

This sub-heading refers to funding provided before formal hearings are initiated before the Boards. While not specifically excluding the OEB the submissions regarding this extension clearly contemplated its usage predominately in relation to proceedings under the EAA and thus before the EAB or Joint Board.

Much of the support for such an extension came from submissions responding to the recommendations proposed by the EA Task Force for funding during the planning and consultation process.[60] These have been described previously. (see I.D.) However, several submissions on the IFPA urged extension of funding to early parts of the environmental assessment process.[61]

An extensive discussion of such possible extension comes from the EAB itself in response to the Task Force Report:[62]

> **EA Recommendation**
> A mandatory program for the distribution of funding to participate should be available at the earliest stages of the EA and prior to any scoping hearing for the ADD. Such funding could be similar to that existing under the IFPA, 1988.
>
> Consideration could also be given to assisting participants through the development of an independent panel of experts (e.g. ecologists, lawyers, planners, engineers, hydrogeologists, biologists, environmental consultants) to provide independent and professional support for the intervenors. Such a panel might be developed within the Ministry of the Environment or other government agencies. Its role might be similar to that of independent workers' advisors as constituted at the Workers' Compensation Board.
>
> **Discussion**
> If the EA Board is to conduct scoping hearings during the ADD stage, then a program for mandatory early intervenor funding or other assistance is desirable. This is particularly relevant given the EA task force statement that the public and other parties "have an obligation to educate themselves about the central facts and issues and to make their concerns known at the earliest opportunity".
>
> The EA task force proposals appear to support the perceived proponent-centred EA process. Is it realistic to expect the proponent voluntarily to fund strong adversaries? The quality of current EA's is seen as being too dependent on the proponents appreciation of adherence to the principles of EA.
>
> A more balanced and effective EA process is possible if EA participants have access to relevant expertise that is able to review an undertaking critically during the earliest stages. In this case, undertakings fundamentally at odds with the public interest could be identified early in the process. If critical public reviews are included in the EA document, the EA Branch and the Board will receive more balanced pre-filed evidence on the perceived costs and benefits of the undertaking. If the intervenors' concerns are well represented in the EA document, the MOE review and EAB hearing process could be shortened. Effective intervention at the earliest planning stages may encourage changes to the design of the undertaking that will direct the EA on a more environmentally and socially acceptable path that is less likely to end up in a costly dead end.

> Other important issues to be considered in designing appropriate early intervenor support systems include: the need for the public to have access to relevant expertise to protect their interests; the need to ensure that funding does not result in the total delegation of control of the process from the public to professional experts; the role of the MOE and the EA co-ordinator should play in encouraging and facilitating public input to the process; the role that non-profit organizations can play in supporting intervenors; the rules that should govern the eligibility of corporations and other government levels to apply for intervenor support; the rules for applying acceptable intervenor support programs to small proponents and private sector proponents and mechanisms for formally incorporating early intervenor assistance as part of the proponents planning costs.

Such early funding is taking place now on an ad hoc basis. The Essex Windsor Waste Management Committee (EWWMC) reports that it has an Order-in-Council for a pre-intervenor participant funding process: "The essential purpose of this process is to hopefully reduce the time required for the potential intervenors at our landfill environmental assessment process to acquaint themselves with our case and prepare themselves for the hearing."[63] Commenting on the EWWMC initiative its Public Advisory Committee observes:[64]

> PAC believes that the initiative of the EWWMC in pioneering "pre-intervenor" funding will further enhance public participation in decision making, and deserves to be carefully considered as a model for inclusion in any renewed legislation.
>
> From the public's point of view, it allows interested groups to state their intention to participate in a hearing, to have earlier access to documentation, to identify earlier those who may share their concerns, and most importantly, to put their legal and technical advisors in a position to begin their work earlier.
>
> From the proponent's point of view, there is an earlier naming of the players in the hearing process, there is a better opportunity to clarify and reduce points at issue, prior to the actual hearing, the additional expense is minimal, and the potential is greater for avoiding delays while participants analyze hearing documents and prepare their positions.
>
> From the hearing panel's point of view, pre-intervenor funding should result in more sharply focused presentations

> at hearings and thus make the hearing process more efficient.
>
> From everyone's point of view, anything which would shorten hearings while maintaining the quality of the outcome is desirable.

Ontario Hydro has some observations concerning the initial process and the hearing both in terms of providing early opportunities for participation and requiring intervenors to explain if they have not taken part in the initial stages:[65]

> A major drawback associated with the Act, and indeed with the hearing process in general, is that it does not appear to acknowledge efforts by the proponents who may have gone to considerable lengths to involve and support members of the public in the planning of the undertaking and the preparation of the environmental assessment document. Neither does the legislation require that funding applicants demonstrate that either they were unable to take part in such planning processes, or that their involvement was ineffective or inadequate for reasons beyond their control.
>
> The Act should also consider advancing some portion of the IFPA award immediately to parties without appropriate resources to begin evidence preparation. This "seed" money could be in the form of a percentage of the total award - say up to 10%.

Finally, the EAB in its submission does recommend early funding, referring to its response to the EA Task Force reproduced earlier, and linking that funding to the role of the hearing Board:[66]

> The Board has recommended to the Environmental Assessment (EA) Task force, established by the Ministry of the Environment (MOE), that intervenor funding should be made available at an earlier stage in the EA process. This early funding would enable intervenors to retain legal and/or expert advice to assist them in identifying issues of concern and negotiating the co-ordination of their cases or the formation of coalitions with parties of like interest.
>
> We believe the IFPA should be amended to provide for the establishment of a funding program at an earlier stage in the approvals process. For complex matters, the provisions of the IFPA should clearly allow an initial funding program, and a final funding program to provide financial assistance for case preparation and presentation concerning the issues

identified by the Board.

**Recommendation 3**
(a) That the amended *Intervenor Funding Act* should include provisions for intervenor funding at the earliest feasible stage in the approvals process. The purpose of this initial or first stage funding program should be to provide the necessary financial assistance for eligible intervenors to identify the issues of concern, to negotiate with parties of similar interests with a view to forming coalitions and/or co-ordinating their case preparation and presentation, and to prepare a plan for the preparation and presentation of their cases.

(b) That the amended *Intervenor Funding Act* should include clear provisions to allow the hearing Board to determine the relevant issues in a proceeding after the initial funding program described in 2(a) above, has been completed and before the commencement of a second stage funding program related to the costs of case preparation and presentation.

### v) Relationship Between Funding Panel and Main Hearing Regarding Determination of Issues

A difference has emerged between the two Boards regarding determining any interrelationship between issues in the funding hearing and the issues in the main hearing. Ms. McWilliams describes these differences:[67]

> Although subject to the same legislation, the OEB and the Environmental Assessment Board have interpreted it somewhat differently. The OEB and the Environmental Assessment Board differ with respect to the timing in scheduling the funding hearing and identifying the issues in the main proceeding. Section 3(4) of the IFP Act provides,
>
> (4) After determining all issues related to intervenor status, a board shall not proceed further with a hearing,
>
> b) until the funding panel for the hearing has advised the Board that all applications for intervenor funding have been decided..
>
> The OEB schedules an Issues Day at which it identifies and determines the issues in the main proceeding and on which the funding panel is to consider intervenor funding. This enables the funding panel to restrict funding to issues determined by the Board as relevant to the main application. The OEB has taken the position that if it cannot hold an Issues Day to determine the issues in a proceeding prior to

a funding hearing, the funding panel would have no guidance as to what the issues would be and the exercise of its jurisdiction under Section 7(1) in identifying public interest issues would be speculative and limited to the original rate or leave to construct application and the submissions made before it by the funding applicant and the proponent gas utility.
[ Ms. McWilliams then described an unsuccessful challenge of the Consumers' Coalition, an intervenor, to the OEB's position.]

In contrast, the Environmental Assessment Board's interpretation of Section 3(4) of the IFP Act closely followed the approach proposed by the Consumers' Coalition. The Board chose to interpret Section 3(4) to restrict it from dealing with the identification of issues, the phasing or staging of intervenor's evidence or any jurisdictional questions until all applications for intervenor funding had been decided by the funding panel. That is to say, the funding panel had to make a preliminary estimation of the issues for intervenor funding without any prior guidance from the Board panel. The problem of this approach was brought to a head by the assessment hearing into the Ontario Hydro's twenty-five year Demand/Supply Plan.

In recognition of the magnitude and complexity of the issues and the number of potential applications for funding, the fundraising panel in the D/SP hearing divided the hearing program into two stages. Stage I was to establish the eligibility of the intervenors under the IFP Act and to provide preliminary funding to allow the parties to work together to identify the issues they wished to address and to negotiate to eliminate duplication, to attend preliminary meetings and hearings. Stage II was to determine whether additional funding should be provided to the eligible applicants and if so, for what and in what amount, and whether funding should be provided to parties given intervenor status subsequent to the Stage I hearing.

Apart from the EAB's concern about the ballooning applications for funding, the difficulty facing the panel in speculating as to the issues to be determined by the hearing panel prompted the Board to recommend that Section 3 of the IFP Act be amended by adding a new Section 3(4) to clearly state that the Board may make preliminary determinations in respect to the issues and the hearing format, and to amend the existing Section 3(4) to provide that the Board may make rulings on jurisdictional relevance and procedural issues that arise during the intervenor funding process. The Board found that if initial determinations could not be made intervenors had difficulty in estimating their expenses and in deciding whether their evidence should be phased or

> staged so that they could limit their participation to those parts of the hearing dealing with issues of concern to them. The Board was also concerned that work relating to issues ultimately found by the hearing panel to be irrelevant would be funded, and that work on issues later found to be relevant to the hearing would not be funded. The Board believed that the funding process would be significantly protracted by these uncertainties.

One proposed solution echoes the EAB recommended amendment just described.[68] A second advocates a two stage approach that would shuttle back and forth between the funding panel and the main hearing:[69]

> With a suitable amendment to the Act, and where time allows, this problem could be overcome with a two stage approach -- an initial interim funding process for counsel and some expert assistance to cover the costs of a motion to the main panel to settle a disputed issues list. This would be a relatively fast process. After the main panel issues its scoping decision there would be a further funding hearing before the funding panel based upon the hearing panel's decision.

In their submissions the Boards themselves continue with quite different approaches. The OEB's recommendations and reservations are as follows:[70]

> Under the present legislation the question of holding an issues day (whether as part of the actual hearing or not) is a subject of some debate. The current practice of the Board is to schedule an issues day prior to the funding day when the utility, Board Staff and the intervenors propose the various issues to be argued at the hearing and the Board determines a list. This list is then used by the funding panel to determine the relevancy and the level of funding allowed to the intervenor. Participation in both hearings is eligible for funding, albeit after the fact.
>
> Some intervenors have objected to this practice because it may be in contravention of Section 3(4) and the Board is of the opinion that the Act should be amended to confirm the Board's current practice.
>
> If issues day was not held prior to the funding hearing, it would be the funding panel which would determine what evidence the main panel would hear and the only guidance that the Act provides in that regard is Section 7(1) which

> allows funding for public interest issues affecting a significant segment of the public. The result would be that little or no consideration would be given to time constraints or the necessity of focusing the hearing on specific issues. For example, an exhaustive examination of a utility's depreciation practices is within the public interest at any time but as an issue for a rate hearing, it probably warrants examination only every five years.
>
> In order to ease this problem, the Board recommends that Board Staff be used more extensively by intervenors for co-ordinating their interventions, determining the issues and saving customer costs. Board Staff is required to ensure that at the end of the day, there is a complete record and that duty can be more effectively carried out if there is co-operation with other intervenors. As well, everyone involved in the process should be committed to easing what is a long and complicated procedure by dividing up the issues, sharing duties, and generally avoiding duplication. Intervenors should therefore be encouraged to consult with Board Staff on the utility's application even before they have completed their funding applications.
>
> Provision could be made to fund issues day and these consultative sessions (in advance of the normal funding disbursement) if the process proves to be protracted or the costs are extraordinary but under normal circumstances, the delay in reimbursement until after the funding decision should not prove a serious hardship to most intervenors.
>
> **Recommendation 3:**
> **Any new funding act should provide that intervenors may apply, in extraordinary circumstances, for partial funding to account for expenses incurred before the funding hearing.**
>
> **Recommendation 4:**
> **Any successor to the Act should state that funding is allowed only for those issues which the main panel has determined are to form the subject matter of the hearing for which funding is sought.**

The EAB, in contrast, displays much more interest in staging and involvement of intervenors:[71]

> As a result of its experience with intervenor funding programs, on February 4, 1991, the EAB presented four recommendations for changes to the IFPA to the Minister of the Environment. This correspondence forms Appendix B to these comments. (One of the recommendations, about the IFPA definition of disbursements, had been presented to the Minister early in 1990 and is discussed later in these

comments)

At that time, the Board recommended that section 3 of the IFPA be amended to state clearly that the hearing Board may make preliminary determinations of the issues to be addressed at the hearing and the hearing format, before the deliberations of the funding panel commence. The Board also asked that the Act be amended to allow the hearing Board to determine certain issues referred to it during the funding process by the funding panel or through motions by the proponent or the intervenors.

Even if an amended Intervenor Funding Act makes provisions for early intervenor funding pursuant to Recommendation 2(a) [sic 3(a)?] above), the February 4, 1991 recommendations for amendments are still desirable. Such changes would provide a scheme whereby, in less complex cases, the hearing Board could identify the relevant issues during preliminary proceedings in order to assist the intervenors and the funding panel in the development of an effective intervenor funding program.

Subsections 4(2) and 4(3) of the IFPA provide that the funding panel shall not determine any issue in the hearing and shall determine only the issues related to the determination of the funding proponent eligibility for funding and the amount of the funding. However, the Board's experience (described at pages 3 and 4 of Appendix B) has identified the need for the funding panel to make at least a preliminary identification of the relevant issues in order to determine the eligibility of applications for funds and to determine the amount of the funds to be awarded. For example, how can the funding panel determine whether an intervenor has a clearly ascertainable interest which requires a separate representation at the hearing if it does not know whether the intervenor's interests coincide with what might reasonably be expected to be relevant issues at a hearing? Can a funding panel determine the amount of funding required for a party to prepare and present its case in such circumstances?

**Recommendation 4**
(a) That the amended *Intervenor Funding Act* provide that the hearing Board may make preliminary determinations of the issues to be addressed at the hearing and the hearing format, and

(b) That the amended *Intervenor Funding Act* provide that the hearing Board may make rulings on jurisdictional, relevance and procedural issues that arise during the intervenor funding process and are referred to it by the funding decision-maker or by motions from the proponent or the intervenors.

**vi) Criteria For Funding**

As described earlier (sec. I.C.) there is a two step test for eligibility. The first, in section 7(1), stipulates that funding may only be awarded in relation to issues which basically are of significant public interest.[72] The second, in section 7(2), sets out eight criteria for determining which of the significant public interests will be funded.[73]

Before dealing with the particulars of either sections 7(1) or (2) we should note a basic difference in the submissions of the Boards regarding criteria for funding. The EAB does not make any specific recommendations in this regard. In contrast the OEB makes several but all in aid of its first recommendation: that intervenor funding should depend on anticipated contribution and not ability to access funds, that is, regardless of inability or ability to pay. As the OEB explains, this overarching recommendation and the related specific recommendations are influenced by the exercise of its costs power which it has exercised since 1985. It has also indicated in its submission delivered in the last week of January, that "the intent is to align the principles of funding awards with those of costs awards and the results should be available for comment shortly". Unfortunately, constraints have required us to proceed without these "results".

As the OEB explains in its submission, questions of "representativeness and responsibility" are deciding factors whereas questions of wealth or, conversely, inability to pay are essentially irrelevant in its costs awards:[74]

> Funding at the beginning of a hearing and the awarding of costs at the end are so very closely connected that it could be argued that you can't have a review of one without the other. This alliance between the two has prompted the Board to review its policies on awarding of costs as part of this funding review. The intent is to align the principles of funding awards with those of cost awards and the results should be available for comment shortly.

> The historical criteria for awarding costs are the result of a hearing by the Board on the Awarding of Costs and Related Procedural Matters (E.B.O 116 dated June 12, 1985 excerpts from which are attached as Schedule 1). These criteria closely parallel those set out in Section 7(1)(a) and 7(2)(a) and (b) of the Act and they can be summarized as follows:
>
> > Costs should be awarded to those intervenors in all hearings before the Board who are directly affected by the outcome and who participate responsibly in the proceeding and contribute to a better understanding of the issues before the Board.
>
> By this definition, the Board has allowed most of the costs for all parties to a hearing regardless of whether they represent a strictly private interest or if they are wealthy or benefit directly from the outcome of the decision or if they are large industrial customer associations or municipalities. The questions of representativeness and responsibility are the deciding factors.
>
> Many of these principles find their way into the following recommendations the Board proposes for the IFPA.

Consistent with these remarks the first recommendation of the OEB states:[75]

> **Recommendation 1**
> **There should be a preamble to any new funding legislation stating that: The eligibility of a party to properly intervene in a proceeding under this Act shall be determined by its anticipated contribution to the process and not by its ability to access its own funds.**

Turning to specific criteria and regarding section 7(1), the requirement that funding only be awarded for a significant public interest, we received only two submissions which dealt with it. The first from, ONGA (Ontario Natural Gas Association - Consumers, Union, Centra), while not addressing this distinction specifically, states that "trade and industry associations should be ineligible .." since they " are comprised of members who not only have adequate financial resources, but represent a parochial interest". ONGA also argues that "matters dealing with any property rights should be excluded..."[76]

The second submission on the "public/private" distinction was from the OEB. Consistent with its observations and its Recommendation 1, just quoted, it concludes that the distinction ought to be abolished:[77]

> In line with this recommended statement of intent, the Board considers that it is important that every intervenor regardless of its public or private nature, be given a proper opportunity to get its views in front of the Board. The Board is of the opinion that no distinction should therefore exist between funding for a public or private issue but rather the test should be: does the intervention meet the intent of the Act and thereby assist the Board in its deliberations.
>
> The purpose of recommending this extension of the Act's provisions is to account for those instances where a decision of the Board may call for it to sacrifice private interests to the public good. For example, the property owner, over whose land a utility proposes to construct a pipeline, should be funded to represent his purely private interests in spite of the all-important public interest inherent in any pipeline.
>
> As well, it should be remembered that no distinction is made in a cost award between a private and a public interest.
>
> **Recommendation 2:**
> **The distinction in Section 7(1)(a) and (b) of the Act between issues of a public nature and those which are purely private should be deleted from any future funding legislation.**

The second issue is whether all criteria in section 7(2) must be met. Submissions and documents that addressed criteria suggested the position that not all criteria in section 7 need be met.[78] One submission pointed out that if that were not so newly formed interests groups that were otherwise qualified could be shut out because section 7(2)(e) addresses "an established record of concern for and commitment to the interest."[79]
In contrast, the ONGA in response to concerns it raises regarding such issues as delay caused by an appeal, cost control, and redundancy of interests, recommends that all criteria in section 7(2) should be met.[80]

A few submissions would eliminate the "financial need" test in s.7 (2)(c) altogether and, therefore, to that extent resemble the recommendation of the OEB, just discussed. The submission of the Association of Major Power Consumers in Ontario (AMPCO) states an amendment should:[81]

> Remove the "financial need" test and make the principal criterion what a particular intervenor can offer in terms of expertise, knowledge, advice, etc. In other words, base the award on the value of the contribution that can be made to the resolution of the particular matter under review.

A submission on behalf of the Niagara Peninsula Conservation Authority takes a similar position.[82]

Finally, the Consumers' Association articulates what it sees as a critical distinction between interests and issues insisting that the former be the focus of funding decisions:[83]

> The Boards should be careful not to use the determination of an intervenor funding application as a mechanism to limit the scope of the participation of intervenors. The Boards' linking of the granting of intervenor funding to particular issues can amount to a pre-determination of the relevance and importance of issues, a pre-determination which is inconsistent with the basic rules of administrative law. The Boards should grant intervenor funding unless particular groups request otherwise, on the basis of a full participation in the hearing without limiting the participation in advance. This may require a more rigorous assessment at the outset of the importance of the interest which any intervenor represents. But that more rigorous assessment is preferable to a pre-determination of relevance and an artificial narrowing of the scope of an intervention. The criteria for awarding funding should focus on the importance of the interest represented and not on the issues to be raised.

As we understand this submission its concerns may be responded to by some of the proposals in (V) above dealing with the appropriate relationship between the Funding Panel and Main Hearing.

Finally, Ontario Hydro argues that applicants should bear the onus. They do now but Hydro's concern centres on the strain that may otherwise be placed on the relationship if the proponent has too prominent a role in challenging the applicant:[84]

**Recommendation # 7: The onus should rest on the funding applicant to satisfy the panel that funds should be awarded.**

The funding proponent should not bear the onus of discrediting a work plan although it ought to retain the right to comment on an application. Requiring a funding proponent to critique an applicant's proposal is wholly inconsistent with EAPIP's recommendations that there be intensive pre-submission issue negotiation among parties and the proponent. The trust and goodwill between parties arising out of these negotiations would be seriously tested by placing the onus on the proponent to examine in detail the parties' proposals for funding before the funding panel. Again the availability of professional advice through a Funding Office would assist applicants in clearly articulating their requests. [The Funding Office is discussed below: see E.(xiii)]

### vii) Criteria For Funding: Contributions From the Intervenor Section 7(2)(d)

Section 7(2)(d) instructs the funding panel to consider whether "the intervenor has made reasonable efforts to raise funding from other sources." This subsection (along with subsection (c) "the intervenor does not have sufficient financial resources to enable it to adequately represent the interest") provides the basis for funding panels to require some form of contribution from the intervenor towards the costs of intervention.

Not surprisingly, two very different views emerged. The first supports the possibility of requiring contribution on the theory that it helps control expenses and promotes intervenors requiring accountability from the lawyers and experts they will be paying if only in a small part.[85]

This view was supported by some intervenors.[86] For example, Stephen Thompson, an agent for the Ontario Federation of Agriculture (OFA) at the Ontario Hydro Demand/Supply Hearing, explained how OFA successfully justified to the funding panel that provision of services was satisfactory in lieu of provision of funds:[87]

> In order to satisfy the Funding Panel's concerns about intervenor contributions, we took a somewhat unique

> approach. Instead of contributing funds (which we didn't have because of continuing severe budget constraints), the OFA proposed to contribute office services and to meet all disbursements so that I, an out of town consultant, would not have to provide these services on my own and then expect the OFA to reimburse me. We argued successfully that the provision of services of this sort should be viewed with similar consideration as the contribution of funds. We also argued that this type of economization was entirely consistent with the aims and objectives of the IFPA in that it encouraged intervenors to be responsible and objective in their application.
>
> Thus we feel that intervenors who have limited or no funds can often contribute in kind. If this approach is presented properly to the Funding Panel, we feel that intervenors should be able to obtain adequate funding to meet salaries and fees involved in mounting a meaningful intervention. Naturally, the previous comment depends on the rest of the application criteria being satisfied.

A second view is very wary of the need for contribution or, indeed, flatly opposed. The contention is that because of the complexity involved in the hearings funded by IFPA and because of the proliferation of environmental and other public interest groups it is very difficult to raise substantial funds.

Moreover, the funding panel may impose obligations on a number of intervenors which are not equitable given the intervenors varying circumstances. David McRobert formerly of Pollution Probe and writing in his personal capacity, describes the experience at the Ontario Hydro D/SP hearing[88]:

> Pollution Probe offered to make a $90,000 contribution in June 1990, which was when the recession was just getting going. We made a commitment to raise $20,000 in our own fund raising projects, and to donate $10,000 worth of staff time for typing and other secretarial work. The other $60,000 represented fees for my work donated by the organization to the intervention (ie.$30/hr x 2,000 hours over the two year intervention).
>
> At the time, staff at Pollution Probe thought this was a fair amount relative to the sum we were asking to Hydro to give us for our intervention -- which was about $330,000. However, when I found that other intervenors were only required by the Funding Panel to donate the same amount as we offered, I was shocked. For example, if my memory serves

> me well, most groups were required to contribute $30,000 and some donated staff time, even though their awards were often much larger (eg. the Coalition was awarded over $2.4 million). The logic of this approach is highly questionable, especially when the larger financial resources available to some groups are considered. The Funding Panel should be required to consider the amount of contribution from a NGO toward an intervention in relation to 1) the size of the funding award sought; and 2) ability to pay.
>
> Having tried to raise money for Pollution Probe's D/SP intervention during my short stint there, I am convinced that this is a difficult requirement for public interest intervenors to meet for most complex regulatory hearings. It is very hard for Pollution Probe to do a mass mailing to its members solely to raise money for a hearing like the D/SP hearing. The issues raised in the hearing (ie. demand management potential, avoided costs, and technological capability) are extremely complex. I would guess that only a very small number of people even know the D/SP hearing is going on at all. All of this makes fund-raising for this type of large hearing using conventional tools next to impossible.
>
> Even if a "hook" could be found, it is unclear that it could succeed now or in the future. As you may know, environmental groups are in very tough financial straights of late. Direct mail fund-raising is very hard right now because of an explosion of groups seeking donations to support their work. I personally doubt that things will improve quickly. In my view, this means that public interest groups should not be expected to contribute substantial amounts toward their interventions as a matter of course.

Others writing for the Public Interest Advocacy Centre[89], the Coalition of Environmental Groups and the Council of Canadians[90] urged that the condition be eliminated. The submission on behalf of the Consumers' Association of Canada (Ontario) states:[91]

> For a broad based consumer organization such as CAC (Ontario), a requirement to contribute their own funds would in effect mean that we would not be able to participate. In order to contribute funds we would have to curtail other "consumer" activities, and this would be neither appropriate nor justifiable.

Finally, and again consistent with its overall goal to treat intervenor funding as it does costs, the OEB would repeal both section (7)(2)(c) and (d):[92]

> Encouraging established groups to represent their members will...not bring before the Board all the public interests as contemplated by the Act. Small and more particular public interests as well as private interests should also be encouraged to state their case before the Board.
>
> One of the ways of effecting this is to delete Section 7(2)(c) which speaks of an intervenor's financial resources and its inability to fund its own representation. It is the opinion of the Board that this standard is not necessary as it does not assist in furthering the intention of the Act and does not facilitate the hearing process in general.
>
> A present, the application of the subsection argues against funding municipalities and organizations such as Greenpeace Canada because of their large budgets. It is often difficult to apply this subsection and in the opinion of the Board, it does not serve any purpose to deny funding to an intervenor who, if it assists the process, will likely get its full costs in a few months anyway.
>
> Section 7(2)(d) of the Act requires the funding panel to consider whether or not the intervenor has made reasonable efforts to raise funds from other sources. This section has resulted in concerns from intervenors as to the virtual impossibility of raising funds from its members for such an esoteric undertaking as intervening in a case before this Board. It doesn't assist the process for an intervenor to be force to undertake fundraising efforts just to become qualified for funding. As well, no such standard exists in the Board's costs award guidelines.

~~~

**Recommendation 8:**
**The Board recommends that any new funding legislation not include any restriction similar in nature to the financial resources standard contained in Section 7(2)(c) of the Act.**

and

**Recommendation 9:**
**The requirement for the examination of the fundraising efforts of an intervenor seeking funding (Section 7(2)(d)) should be deleted from any future funding legislation.**
~~~

### viii) Criteria For Funding: Coordination of Intervenors - Section 7(2)(f)

Section 7(2)(f) requires the funding panel to consider whether "the intervenor has attempted to bring related interests of which it was aware into in an umbrella group to represent the related interests at the hearing."

Two views on this criterion emerged. One condemned it outright as wasteful and blunting of various perspectives that ought to be fully represented. Energy Probe (as part of its submission recommending IFPA be scrapped in favour of an elaborated costs regime[93]) was particularly condemnatory[94]:

> **The Coalition Forcing Provisions of the IFPA All-But-Guarantee That Public Interest Concerns Are Diluted at the Hearing, Weakening the Intervention and Diminishing Its Value**
> In the interests of eliminating duplication, streamlining the hearing, and saving the proponent money, the IFPA coerces organizations with apparently similar goals to join forces in a joint intervention. Yet these organizations are all quite different. In the case of environmental organizations, although they quite often join forces in a coalition, more often their points of disagreement are significant enough to prevent their joining forces.
> The IFPA removes from these groups the discretion to decide whether the hearing at hand is a case in which their differences are substantial, putting great pressure on them to come together. In so doing, these groups find themselves adopting compromise positions in order to remain eligible for funding. The compromise, moreover, is likely to be mediated by their experts, who have inordinate influence in the adversarial negotiations which may take place among the parties, particularly with coalition members who are relatively new to the issues. In practice, in any given issue - whether water quality, landfill, wetland preservation, energy conservation, forestry - very few groups will have great depth in the matter, yet many may be involved in the hearing, and all may find themselves part of the same coalition. The one or two groups knowledgeable in the area could find themselves outvoted by those new to issues in the negotiations that are forced upon the parties. That the parties have been brought together by the lawyers and consultants further removes their bargaining room.
>
> The result may be a smaller direct cost for the proponent, but the money will have been wasted, in that the hearing panel no longer benefits from the diversity of views among

> the coalition members, and the panel may well be hearing positions that would more accurately be described as the personal views of the lawyers and consultants - which the IFPA expressly intended to avoid - rather than any long-held expertise from the intervenors.
>
> **The IFPA Encourages Parties to Adopt Artificial Positions to Differentiate Themselves From Other Parties, And So Qualify for Funding**
> Because the IFPA Process effectively establishes a competition for funds, and expressly requires intervenors to coordinate their positions prior to making their funding applications, the intervenors find themselves carving up the various issues among themselves, and exaggerating differences and blurring similarities to better secure their share. Where intervenors do not have well defined positions, particularly at the outset of a hearing into a relatively new matter, such intervenors will feel pressed to prematurely establish a firm position, and one that differs from that of others.

A similar attitude was shared by the Stewardship Advocacy Coalition of Ontario Churches which protested "the overt tendency to group together interest groups in a seeming effort to move to a situation of a large scale intervenor versus a large scale proponent. This process towards large scale is a further symptom of the problem and feeds into the growing sense of futility held by the average citizen in regards to how our systems of decision making works"[95]

A second view is more moderate, accepting in principle the concept of coordination but raising concerns about inappropriate instances of application.[96] Prominent among these is the Consumers Association of Canada (Ontario) which actually withdrew from a hearing before the OEB when a coalition against which it protested, was forced upon it. (In the event the other intervenor and party to the coordination, the Ontario Federation of Agriculture eventually also failed to appear[97]). The Consumers' Association comments[98]:

> With respect to smaller more focused hearings, such as matters before the Ontario Energy Board, the CAC (Ont) has experienced difficulty with the application of the Act. For example in 1990 the CAC (Ont) was granted funding but only

> on the condition that it work jointly with the Ontario Federation of Agriculture ("OFA"). The amount of funding was approximately $28,000.00. The CAC (Ont) declined the funding on the basis that there was a fundamental conflict of interest between the OFA and the CAC (Ont). The CAC (Ont) is exclusively a representative of residential customers of Ontario Hydro. The OFA is a commercial and industrial lobby group on behalf of Ontario's farmers. The fact that many farmers in fact live on the same property as their place of business does not change the fundamental nature of their interest, which is a commercial and not a consuming (i.e. end use) interest.
>
> The education of Board Members as to the true nature of each of the intervenor's interests is a critical part to the process. There is an initial obligation on the part of Board Members to expend more time in understanding the true interest of each interest group and a continuing obligation for continuing education. We are certain that many groups have experienced this "education start up problem" and trust that it can be resolved with greater familiarity with the process, players and issues.

Representations to similar effect were received concerning Energy Probe[99] and an individual citizen Mr. Ian Goudy[100]. Both of these experiences were also before the OEB.

The Public Interest Advocacy Centre does not reject the concept of coordination but does suggest a modification that would appear to be responsive to the concern just described[101].

> **The provision corresponding to paragraph 7(2)(f) in the Act should be amended by adding the underlined sentence to read, as follows:**
>
> **"the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing. Where it appears to the panel that an intervenor might coordinate its plan of activities with that of another funded intervenor without losing the ability to represent its separate and distinct perspective fully and effectively, all such intervenors have the burden of showing why such a coordinated plan of participation should not be a condition of funding for any intervenors concerned."**
>
> This proposal is designed to ensure that coordination of efforts between intervenors is encouraged by the Act only when it is both "efficient and fair". Encouraging

> coordination may be unfair if it requires that one expert or a shared legal counsel is to be funded to do all the work on a given issue when the positions of two or more intervenors on that issue is or may be in conflict. In such cases, only the exchange of factual information resulting from an expert's work should be encouraged as a condition of funding to the extent that such information can fairly be said to be non-controversial or not subject to differing interpretations as to significance and meaning in light of the issues and perspectives of the intervenors concerned.

### ix) Level of funding and Legal Aid Rates

Consideration of this topic can be divided into two sets of issues. First, regarding general considerations in terms of levels of funding, there are a series of points relevant to how the Boards set the level of funding overall. Second are particular issues pertinent to legal aid rates as the primary determinant of the level of funding for legal counsel.

#### a) General Considerations

The first point concerns the contention that there are basic differences in approach toward level of funding. This point was canvassed earlier in the discussion of differences between the EAB and OEB (sec. VI.D.) and will not be repeated here. The nub of the assertion is that the OEB, generally, takes a decidedly more conservative approach to levels of funding.

The second point is related to eligibility for funding since it is an argument that funding applicants ought to receive payment for legal counsel to participate in the funding hearing even if the application is not successful. The Consumers' Association submits:[102]

> CAC (Ontario) is concerned that the whole process of "intervention" at a Hearing is an adversarial one. It requires the use of legal expertise and the use of expert witnesses who answer questions and may not be the best way to determine the outcome in any particular circumstance.
>
> However, if we are to participate in Hearings, then we have to retain legal counsel, obtain the services of experts in

> the field, and enable our volunteers to "manage" the process. CAC (Ontario) believes there are serious shortcomings in the Act as it does not provide for any funding to retain legal counsel. In the case of our application for funding to intervene at the Hydro Rate Hearing H.R. 19, when we were denied funding (or more precisely, given funding in such a manner as made it unworkable for us), we were still left with a legal bill to pay for the preparatory work done by the lawyers. Subsequently, we have had to be very clear in our arrangements with counsel that we do not have money to "retain" them ... While we have been successful in making such arrangements, it is certainly not something that I believe we can count on. Similarly, in seeking expert witnesses, we cannot ask them to begin to actually "work" for us until funding is secured, and hence can run into timing problems.
>
> Recommendation:
> 2. That any Intervenor Funding Act provide a mechanism for intervenors to secure legal counsel (and pay them), even in the event that they are not successful in their application for funding.

The third point concerns consistency in setting levels of funding among intervenors in the same or closely related hearings. Three intervenors raised related concerns all focusing on the Ontario Hydro Demand/Supply hearing before the EAB[103]. The Consumers' Association observes[104]:

> It is very difficult in complex matters for the Intervenor Panel to adequately judge the requirements for intervenor funding. In the Ontario Hydro Demand and Supply Plan Hearing ("DSP") our client feels that much more flexibility was and is required in the intervenor funding process. In the Ontario Hydro DSP the entire environmental plan put before the EAB has changed. Ontario Hydro has changed their case to an extent where a "rebalanced" (i.e. new) plan will in fact be presented to the Board. There is no flexibility in intervenor funding awards to deal with this problem short of a full blown application. Other problems include:
>
> (a) Intervenors were funded on very narrow issues which rely on building blocks delivered by other intervenors. There is no tracking as to whether or not intervenors have in fact carried out their appointed task.
>
> (b) In the DSP hearing the Intervenor Funding Panel

> identified certain intervenors as lead intervenors on certain issues and other intervenors as supporting intervenors. Funding was awarded on a relative scale whereby directionally, lead intervenors received much more money than supporting intervenors. There is no follow-up system to determine whether or not the work was undertaken let alone satisfactorily achieved. Audits do not accomplish this monitoring role.
>
> ~~~
>
> Standard Setting
>
> Consistent standard setting for particular matters such as preparation time and hearing time. The allowed lawyers preparation time in the DSP is woefully inadequate. It is the experience of trial counsel that for every hour spent in court, two hours are required to prepare interdependence (sic) required by the funding award. Also, no time was given to track other intervenors' cases which is especially important given the intervenor interdependence required by the funding award.

Nancy Kleer, counsel for the Moose River/ James Bay Coalition and the Nishnawbe-Aski Nation/Grand Council Treaty #3/Teme-Augama Anishnabai, speaking of the same hearing contends[105]:

> In this hearing, several of the intervenors who are not in support of new major supply were concerned over the amount of funding that was awarded to intervenors who are, although not in agreement with the proponent, certainly not taking the position that the proponent should not proceed with one or more of the options. Some of these intervenors received considerably more funding than was received by other intervenors in opposition. These intervenors were not in a position of financial need comparable to that experienced by other intervenors, and it would seem appropriate that the amount of funding awarded would be reduced by some percentage for those intervenors who in fact do have money to pay for interventions in hearings such as these. The percentage should probably not be pre-specified in the Act, but the Panel ought to consider a global award reduced by a percentage in light of the funding available to such intervenors to participate in the intervention.

The fourth point concerns the level of funding awarded to intervenors and its relationship to the amount of money to be expended by the proponent particularly in relation to the main hearing. Joseph Castrilli raises this point and relates that the Boards have not taken up the matter on the grounds that information about the proponent is not relevant or that they have approached the question only indirectly[106]:

> The question has arisen as to how a tribunal can test the reasonableness of funding applications before it in the absence of knowing something about the comparative expenditures of the proponent. Proponents have argued that such information is not relevant to an IFPA proceeding and, even if it was, such information is privileged. The Joint Board in the OWMC matter recently ruled during the course of a supplementary funding hearing that it is not relevant to examine the specific hearing budget of the proponent in order to assess the adequacy of an earlier funding panel award to intervenors.
>
> ~~~
>
> In December 1990, a funding panel of the Environmental Assessment Board awarded $21.5 million to 29 intervenors in relation to an Ontario Hydro plan for the supply of electricity in Ontario over the next twenty-five years. The plan is subject to the EAA under which hearings on the substantive matter commence in April 1991. This is by far the largest award under the IFPA since its inception. The Funding Panel's reasons for the magnitude of its award included the fact that the Ontario Hydro Plan " contains massive general proposals which will affect every individual in Ontario for generations. It has the potential to produce major shifts in economic development, to set patterns and precedents for future energy use, to affect natural resources, urban and rural life styles and to have significant, different effects on different areas of the province." In addition, the Funding Panel held that the "anticipated effects of the [Ontario Hydro Plan - called the Demand Supply Plan - DSP] may be widely different on specific groups of people including those near future nuclear and other major generation plants; aboriginal people living on and off reserve; the farming community; municipal entities in isolated geographic regions; industry and commerce and others.
>
> This funding decision suggests that funding panels will be sensitive to the scope of the proponent's undertaking in considering the scope of intervenor funding required.

This point of determining intervenors' awards by looking to the proponent's costs was also raised elsewhere, though sometimes the focus was on the anticipated total project cost to the proponent.[107]

However, it is the EAB that faces the point about the relationship between the proponents' costs and intervenors' costs most directly. Earlier in this section we noted that the EAB, in its submission, stated that there were two "fundamental" issues that needed to be addressed. The first, dealt with earlier, concerned the establishment of an independent intervenor funding agency. The second concerns either limiting funds that public proponents can spend on their cases or awarding intervenors funding relative to the funds available to public proponents:[108]

> Many of the proponents who appear before the Board or joint boards are well-financed public bodies. The Board believes the substantial resources provided to public proponents have a psychological and practical effect on intervenor funding programs. The large resources of the proponent can create a perceived and a real imbalance which intervenors believe can only be redressed by the awarding of commensurate amounts of funds to allow them to prepare and present their cases.
>
> Public proponents are not required to meet the same tests as intervenors in order to acquire public funds to finance the preparation and presentation of their cases. There appear to be few checks and balances to ensure that these public monies are carefully spent.
>
> The Board recognizes that it would be difficult to legislate a limit to the funds available to public proponents because of the considerable variability in the complexity of public proponent applications. If funds were to be limited in any way the limit would have to be established at a very early stage of the environmental approvals process when the proponent is beginning to prepare its environmental assessment and other documentation required to support its application for approval.
>
> An alternate approach would be to have the Act specify that awards to intervenors may relate in quantum to the amount spent by the proponent for legal counsel, hearing coordinators and expert witness testimony. In addition, intervenors may be provided a sum for preparation of expert evidence (technical reports) which may be proportionally linked to the proponent's preparation costs. In this option, proponents would be made aware that they should not hope to overpower their opponents by using public funds to

hire more experts and commission more studies, for once the hearing has begun they could be required to provide proportional financial support to their opponents.

**Recommendation 2**
That the amended Intervenor Funding Act include measures to either limit the funds available to public awareness to public proponents for the preparation of their cases or make it known that there will be some proportionality in funds awarded to intervenors relative to the funds available to public proponents.

### b) Legal Aid Rates

Section 7(3)(a) stipulates that lawyers will be paid at the legal aid rate. This provision places a ceiling on the hourly rate and is, in some cases, considerably lower than lawyers would otherwise earn in private practice.

Not surprisingly this limit was opposed by several respondents including some funded intervenors and the counsel who represent them[109]. The submission of the Consumers' Association states[110]:

> I believe that the funding level should be at a rate higher than the legal aid tariff. The risk of having the funding at the legal aid tariff is that intervenors must use only in-house counsel or a less experienced outside counsel, in the overwhelming majority of cases. The use of in-house counsel is, of course, acceptable when the CAC(O) has access to its parent organization's competent, experienced in-house counsel. However, where in-house counsel is not available, intervenors like the CAC(O) may have to rely on younger, less experienced outside counsel.. As a result, an intervenor may find itself at a disadvantage. I think that everyone must be realistic in understanding that there is an advantage in having access to experienced counsel. In addition, I think everyone must be realistic in recognizing that the boards themselves will almost invariably pay greater attention to the positions taken by more experienced, older counsel. Public interest groups should not start out at a disadvantage by having to have younger, less experienced counsel.
>
> The ability to recapture a portion of the expenses in a subsequent cost award is not the most effective way to correct this problem. The possibility that costs might not be awarded may reduce the effectiveness of the participation

> of an intervenor. I suggest that the intervenor funding be awarded on the scale used by the government for outside counsel.
>
> The suggestion that the rate paid to counsel be increased will almost certainly be opposed by intervenor funding proponents. It may also be opposed by the boards themselves, using the argument that increased costs are paid by the consumers, ultimately. However, adequate funding is a necessary precondition to the full and effective operation of the Act. If one goal of the Act is to allow public interest groups effective access to the decision-making process, then the quality of public participation must be assured. The public benefits from effective participation, even if utility rates are increased slightly as a result. Put another way, the purpose of the Act is undermined by less-than-effective participation. The boards can control abuses by the use of cost awards against intervenors who do not participate effectively.

The Canadian Environmental Law Association, also opposing the legal rate limit, makes a comparison with the Class Proceeding Act:[111]

> In CELA's view, the IFPA properly incorporates the "proponent pays" principle, if this principle is to have any substance , it must be taken to mean that the proponent must pay the full freight. Accordingly, it is our submission that the legal aid tariff must not be used to arbitrarily limit the legal fees in public interest interventions. In the alternative, if s.7(3)(a) is to be retained, then funding panels should be empowered to increase the legal aid tariff by a certain percentage (ie. 30% to 50%) so as to increase the hourly and *per diem* rates. We note that a similar "bump up" mechanism is found in the Class Proceeding Act, 1990 in order to provide counsel with an incentive to take on lengthy, risky, or costly cases.

On the other hand, several respondents, including some intervenors and their counsel, indicated that in fact, the cap on legal aid rates in terms of intervenor funding (as opposed to costs awards) presented no major problems[112]. Hugh Fletcher and Jack Gardiner responding on behalf of the "Middlesex Oxford Landowners Committee Association" (MOLCA) responding to our issues paper regarding whether limits to legal aid rates had caused difficulties observe[113]:

> No problem in our case as lawyer had previously appeared before Energy Board and was confident that upon doing

> quality work he would eventually receive higher renumeration. However he did agree to accept Legal Aid rate and the decision of the OEB regarding costs.

The Public Interest Advocacy Centre, while rejecting the legal aid limits, did offer an alternative[114]:

> **There should be no arbitrary restriction of allowable legal fees to the legal aid tariff under the intervenor funding Act.**
>
> In order to preserve some "leverage" between an intervenor funding award (based on all anticipated costs) and a final cost award (based on all reasonably incurred costs), there should be a 10% holdback on a intervenor funding award, subject to the disposition of the main hearing panel in its costs award.

The EAB in its submission does not take a position on the Legal Aid Rate (though it did attach a document from the OH:DSP hearings in which it acknowledged the application at these rates or some slight variation[115]). The OEB, however, would lift the Legal Aid limit. It comments: "Looking back over the three years of funding experience under the Act, it appears that this requirement has only served to ensure that, pending a cost award, lawyers were restricted in what they can be paid by a funded intervenor unlike any other expert working for the same intervenor.[116]" Nevertheless, as discussed below, the OEB recommends that a holdback of 20 to 30 percent would be possible for every funding award.[117]

### x) Disbursements

Section 7(3)(b) stipulates that the funding panel shall set a ceiling on "eligible disbursements" which are defined in s. 7(5) to mean "disbursements for consultants, expert witnesses, typing, printing, copying and transcripts necessary for the representation of the interest and such other expenditures as may be named in the regulations made under this part as eligible disbursements."

Though one submission saw the limits on disbursements as a means of controlling costs,[118] others were agreed that the present provision is too inflexible. This is so because such things as travel for intervenors to coordinate or attempt to coordinate their intervention, non-expert witness fees and expenses and certain equipment required, particularly for complex hearings, may not be covered.[119] Nancy Kleer describes these difficulties and others for the aboriginal clients she represents[120]:

> a. Funding of Elders:
>
> In most aboriginal traditions elders are paid for their work and their travel, if not before the work is completed, at least immediately following. We have had to make special arrangements with the Environmental Assessment Board to provide money in trust to our firm so that we could issue cheques in advance, rather than having to wait for the 6 - 8 weeks following the submission of claims to the Ministry of the Environment, Finance and Capital Management Branch. Some provision for allowing firms to receive these trust monies up front for payment of elders would be useful.
>
> b. Funding for Meetings of Political Leaders:
>
> Because the Intervenor Funding Panel required us to form coalitions of groups that would not normally form coalitions (e.g. NAN/T#3/Teme-Augama) for political reasons and because they are geographically disparate, our clients have been put in a difficult position. The Intervenor Funding Project Act does not allow for reimbursement of political leaders for their travel costs that result from having to meet in various locations. Furthermore, the Act, as it currently reads, does not provide for funding for political leaders to travel. It only provides for reimbursement of lawyers travel fees to the client. It would seem a simple adjustment to allow political representatives of native organizations to receive reimbursement either for travel to law firms, or for travel to another central location to meet with lawyers and other members of these loosely formed coalitions. Aboriginal clients by and large have limited monies and cannot afford these travel costs. Furthermore, they are not in the same position as many intervenors that are more localized and especially, more localized to Toronto where they can travel to law firms with relative ease and low cost.
>
> c. Allowable Disbursements for Aboriginal Clients:
>
> In large hearings such as these, information management is

> critical. However, the Intervenor Funding Project Act does not provide for purchase of computer hardware and software. Although we appreciate that the Board does not want to pay for someone else's computer, some provision must be made to recognize that certain people cannot afford to pay for their own computers, either hardware or software. For example, community co-ordinators are often in this position.

Two specific recommendations were advanced. The Canadian Environmental Defence Fund (CEDF) Study suggests s.7(5) be repealed and a "reasonableness and relevance" test be substituted[121]:

> It is recommended that subsection 7(5) be repealed and that disbursements be made consistent with the Environmental Assessment Board's recommendation to the Provincial government that " a regulation be made that would give funding panels the authority to determine the eligibility of disbursements on the basis of reasonableness and relevance" (emphasis added) (p.22, Ontario Hydro DSP Funding decision). The Board should issue a policy directive that explains what is meant by disbursements that are reasonable and relevant.

The Public Interest Advocacy Centre essentially reflected this CEDF recommendation[122] and added the following embellishment[123]:

> The Act should allow intervenors to re-allocate disbursements within each of the following three categories: (1) legal or office disbursements, (2) experts' disbursements and (3) travel, meals and accommodation. The funding panel should have express power to approve of any other proposed re-allocation of disbursements. As a consequence, there should be no provision corresponding to Section 11 of IFPA in the Act.
>
> This provision would avoid unnecessary administrative work by a funding or a main hearing panel. Relatively minor changes in the planned use of disbursements which do not go to the substance of an intervenor's participation need not be scrutinized. On the other hand, the funding panel rather than a main hearing panel should be granted a clear jurisdiction to approve of a request to make a more fundamental change in the use of funds for disbursements which cross the broad categories above. As IFPA now stands it is unclear whether the funding panel has any jurisdiction once all original awards are determined. It would seem unnecessary to burden a main hearing panel with a

> supplementary funding application, if only a change in the use, albeit a major change across these broad categories, of disbursements is proposed and these is no application for more funds. Further, the funding as opposed to main hearing, panel would have greater familiarity with the original application and could better deal with the proposed reallocation.

The OEB[124] and EAB[125] both made similar recommendations in their submissions.

**xi) Supplementary Funding**

The Act contemplates, in section 12, that supplementary funding awards may be made. Though potentially a very important device to ensure continued participation on the part of intervenors we received few submissions which addressed it.[126] The Public Interest Advocacy Centre[127] made the following recommendations[128]:

> **The definition of "intervenor funding" in the new Act should be broader than under IFPA in order to include supplementary intervenor funding within the statutory definition of intervenor funding and to remove any implied inconsistencies in the Act.**
>
> The following would satisfy these requirements: 'intervenor funding' means funding awarded under this Act in advance of or during the main hearing in any proceedings before the Board, but does not include costs awarded at the end of those proceedings....
>
> **Supplementary funding should be available under the Act at any time until the end of the proceedings whenever the original award was inadequate, having regard to either the quantum or the purposes for which the original funding was awarded, in all the circumstances.**
>
> The main hearing panel rather than a funding panel is better equipped to determine [a] supplementary funding application. The main hearing panel will be able to determine if the original award was inadequate, having regard to the actual participation of the intervenor to the date of the application. Further, the main hearing panel will know if there are any extenuating circumstances in the hearing which would warrant an increase in funding and was not accounted for in the original application. Finally, the main hearing panel will be able to determine whether the actual scope of the intervenor's participation to date is contributing to

> the hearing. Accordingly, if the intervenor had not been funded for areas in which it has demonstrated it was making a contribution, the main hearing panel should be able to vindicate the intervenor's decision to participate more broadly than its original award had anticipated. This would minimize the extent to which an intervenor satisfying the funding criteria bore the financial risk of its participation. Accordingly, a clarification of the nature of the power to award supplementary funding along these lines would advance the purpose of intervenor funding.

The OEB, with little comment, recommends:[129]

> **Recommendation 16:**
> Any new funding legislation should clarify that supplementary funding is designed to cover costs which were not reasonably foreseen at the time of the original application for funding.

**xii) Intervenor Funding and Cost Awards**

In addition to intervenor funding awards all the Boards being discussed now have the authority to award costs. Those cost awards are not subject to the limitations placed upon the intervenor funding award, for example, the legal aid rate for legal fees or the definition of "eligible disbursements."

Nevertheless, substantial differences may be emerging in terms of how the OEB and EAB treat the relations between intervenor funding and costs and what should occur if, for any reason, the costs awards is less than the intervenor funding award. Ms. McWilliams explains: [130]

> There exists an unresolved conflict between intervenor funding and the final cost award. The criteria for funding ...is not the same as the criteria applied by the Board [OEB] in its final order for costs. In exercising its discretion to award costs under section 28 of the Ontario Energy Board Act, R.S.O 1980, c.322, the Board awards costs to an intervenor who;
>
> a) has or represents a substantial interest in the proceeding to the extent that the intervenor or those it represents will be affected beneficially or adversely by the outcome;
>
> b) participates responsibly in the proceeding; and

c) contributes to a better understanding of the issues by the Board.

In determining what portion of an intervenor's costs should be awarded H.R. 19, the Board considers the:

- quality of the intervention and understanding of the issues;
- quality of the counsel or representative in cross-examination and/or examination in chief; and
- quality of the argument submitted, including recommendations therein and the financial implications thereof.

Some intervenor groups maintain that the funding award should be a guarantee which relieves the intervenor from all financial risk arising from its intervention, These groups view funding awards to be separate and distinct from cost awards. In contrast, the OEB views funding awards in the context of its authority to award costs. The OEB is concerned with maintaining its discretion to award costs at the end of the hearing, as a means of controlling its own proceedings. The debate of Bill 174 at the Legislature indicates that the Attorney General did not intend that the funding award abrogate the boards' costs power and their ability through such mechanisms to control their own proceedings.

Section 12(3) of the IFP Act provides that the Board shall deduct the funding award from any costs awarded to the intervenor. Because of the different criteria in an award of advance funding and costs, a cost award may be smaller than the original funding award. Such a possibility may not have been contemplated when the Act was drafted. In one instance, namely the Ontario Hydro proceeding, H.R. 18, the OEB felt that in view of the costs criteria, the contribution to the proceedings by the Independent Power Producers' Association who had previously received a funding award entitled it to 100 percent of its expert witness, reasonable costs and 60 percent of the balance of its reasonably incurred costs. The cost award once assessed, however, turned out to be less than the original funding award with the result that the OEB by Order dated November 9, 1990 called upon IPPSO to return the surplus amount of $6,582.40 (sic) to Ontario Hydro, the proponent of the funding award. This Order was met with some criticism.

The OEB in a number of its funding and supplementary funding decisions has expressly forewarned the intervenor that if the final award of costs is less than the amount of the funding award, any excess amount shall be returned to the proponent. On the other hand, the Environmental Assessment

> Board in respect of the Ontario Hydro [D/SP] hearing issued Cost Guidelines assuring intervenors that they will not be called upon to refund any difference between the funding and cost award, subject to Section 9(2) of the IFP Act. If one reviews the Ontario Hansard when the Bill was discussed, the authority of the OEB to require a refund is not all that clear. Nonetheless, the concern of the OEB to have ultimate control over the process by means of such an order is understandable. Otherwise how is the Board to render the intervenor's performance accountable and assure that the expenditure is well spent and the presentation is effective. The OEB envisions its responsibility as being to the ratepayers and the public interest generally, who ultimately must bear the costs of the process.

An indication of how disparity in the OEB awards can cause problems is illustrated by the submissions on behalf of the Middlesex Oxford Landowners Committee Association (MOLCA):[131]

> **Costs and Funding?**
> This was our only problem area. **Example:**
> Panel awarded us $34,000 for gas consultant. We received the money. Later we received bills from gas consultants for approximately $38,000. We had a contract for $34,000 and funding for $34,000 so we paid him $34,000. The cost awards gave him 80% of $38,000. This amounted to $30,400. However, we had already paid $34,000 according to our contract and Funding Panel accepted Budget. We were left holding the bag for $3,600. We cannot get overpayment back and they feel we still owe them $4,000. Everyone is a loser. Since we are a non-profit volunteer group working for the public interest - who pays?
>
> Appropriate approach from our point of view.
> 1. Consultants should hand in a budget. This budget would be very carefully studied by the funding panel, revised if necessary and when it is okay - then approved.
> 2. A contract would then be prepared using the approved budget.
> 3. The intervenor could pay all expenses up to the approved amount.
> 4. Any bills over budget would be dealt with in cost awards at the end of the hearing by the OEB and the consultants would be required to accept this decision.
> 5. A written contract and the right to pay up to the approved budget amount would make all consultants aware of payments.

David Poch recommends that the issue be resolved essentially in the way the EAB in the Ontario Hydro D/SP hearing is treating the question:[132]

> While the Act seems clear that the two are distinct, in practice the OEB has obscured that distinction. The OEB has read section 12(3) literally to suggest that a cost award at an amount less than the original funding necessitates repayment. This interpretation is completely at odds with the purpose of the Act.
>
> If a funding award is in jeopardy it does nothing to overcome the inability of public interest intervenors to fund these cases.
>
> Costs and funding should be distinct awards apart from the rule against double recovery. Cost awards should be available as a mechanism for obtaining an award for non-funded efforts. For example, the balance of legal fees above the legal aid tariff or, where an intervenor is not being funded for a particular issue or expert in whole or part, they should be free to speculate on a cost award. There is no reason why they should not be eligible if the intervention assisted the hearing panel."

In its submission the EAB was silent on this issue. However, the OEB gave extensive reasons for its recommendation both regarding negative costs awards and holdback in aid of preventing deficiencies:[133]

> There is one serious concern which the Board feels should be squarely addressed in this review and that is the effect of Section 12(3) of the Act which requires the funding award to be deducted from a cost award.
>
> The problem, which is not resolved in the Act, is what happens to the negative balance when the funding award is greater than the cost award. The result is really a negative cost award and the issue is: should the intervenor be required to return the overpayment to the funding proponent or should the requirement in Section 12(3) simply be deleted from the Act?
>
> It is the Board's position that, subject to extraordinary circumstances, (which are discussed below) a negative cost award or at least part of it, should be repaid for the following reasons:
>
> - On its face, a negative cost award speaks of poor

performance by an intervenor and such performance should not be overlooked.

- In obtaining its funding award, the intervenor (or its lawyers and experts) argues convincingly that the "representation of the interest would assist the board and contribute substantially to the hearing" (section 7(2)(b)). However, by virtue of the negative cost award, the intervenor has not lived up to those conditions and between the intervenor and the utility's customers, the intervenor should be responsible for the shortfall not the customers.

- Not to permit recovery of a negative cost award allows an intervenor two opportunities to obtain costs but with no accountability for the way those costs are spent.

- This non-recovery brings the whole process into disrepute and gives out the message that the most important factor in the whole process is participation not the quality of that participation.

- It does not provide adequate protection for the utility's customers who would then be required to pay for all representations regardless of their quality.

- It does not place a funded intervenor on the same footing as one which is not. An intervenor which does not request funding may be subject to something less than 100 percent in a cost award for a poor performance whereas the fully funded intervenor does not take any risk for poor performance.

However, there is another side to the coin that the Board is concerned that the effects of requiring repayment of a negative cost award may be seen by some intervenors as reverting to the situation of a few years ago when intervenors were dissuaded from intervening because of a possibility of being unable to recover their costs .

The treatment accorded a negative cost award by the Environmental Assessment Board ("EAB") is directly opposite to the way it is dealt with by this Board. The EAB does not require repayment and this Board has. This dichotomy is, however, more understandable when the size of the awards granted by each Board is taken into account.

Most of the problem has arisen because of the stark contrast in the type of funding requests experienced by this Board and the EAB. That Board is undertaking an enormous task in regard to the Ontario Hydro Demand/Supply Hearings, and it has granted some individual funding awards of several million dollars. This Board, on the other hand, regulates the utilities on an ongoing basis and its largest funding award has been a small fraction of that amount.

In the opinion of the Board this disparity does not argue well for equalizing the principles of funding awards between the two boards. As well, it is likely that any extension of the Act to other boards and commissions will only exacerbate the problem. Insofar as this Board is concerned, it is felt that a negative cost award is never likely to be more than a few thousand dollars or alternatively it could be held by regulation to a certain level.

In order not to discourage interventions, the Board recommends that, in the event of a negative cost award, the intervenor be permitted a re-hearing under Section 30 of the Ontario Energy Board Act or via a more formal appeal procedure within the new funding legislation. At that hearing, the Board would be required to consider any special circumstances which might have resulted in the negative award on the ability of the intervenor to take part in future Board hearings. As is its usual practice, the Board would be required to issue written reasons for its decision which would be subject to appeal in the normal course.

In order to avoid a negative cost award altogether there could be a holdback of 20 to 30 percent from the funding award. Such a holdback would not be a discouragement to intervention if costs are awarded quickly or on an interim basis as deemed necessary.

**Recommendation 12:**
**Any new legislation should contain a section whereby:**
**1) the possibility of a negative cost award is recognized and provision made for an intervenor subject to such an award, to have a special hearing with the existing right of appeal; and**
**2) a holdback of 20 to 30 percent can be made to every funding award.**

### xiii) Accounting For Funds and Payment of Funds

Clearly, it is vital that monies received by intervenors be used responsibly and be available in a timely fashion. The EAB and the OEB have different approaches in this regard with the EAB experiencing more difficulties.[134]

In addition, the Canadian Environmental Defence Fund (CEDF)[135] and the submission of Nancy Kleer suggest that the EAB process needs improvement. Ms. Kleer suggests:[136]

The Finance and Capital Management Branch at the Ministry of

> the Environment has been reviewing all requests for funds in this [OH:DSP] hearing. With some glitches (eg. lost packages of invoices, misplaced invoices), this has gone reasonably well. However, sometimes this process has taken up to six weeks exclusive of the time required for the Finance and Capital Management Branch to contact the proponent to make payment to the law firm. Perhaps the most simple way to deal with this would be for additional people to be put on staff at the Finance Branch when such a large number of intervenors are involved in hearings such as these. Another option would be to permit payment to law firms in trust, in advance of receipt of each individual set of invoices.

George Davies, the Deputy Minister of Energy, makes a related comment particularly regarding lengthy hearings[137]:

> Use of intervenor funds should be monitored to ensure value for dollar. In the case of a lengthy hearing, this might be accomplished through a staged disbursement process where the hearing panel would approve the release of funds at various intervals during the hearing. This might discourage the use of funding to create procedural delays or irrelevant evidence.
>
> At the end of a hearing, the hearing panel might comment on the value of interventions funded under the intervenor funding process. This would provide feedback to intervenor funding panels and would establish a track record for parties who reappear at future hearings and seek intervenor funding.
>
> Regulatory boards should publish post hearing audit reports comparing the budgeted item allocations in the intervenor funding awards against actual disbursements. This would provide a factual basis for determining the general pattern of disbursements to be used by future intervenor funding applicants and panels to improve the quality of cost estimates and approvals.

Ontario Hydro recommends establishing an independent funding office with several functions a prominent one being monitoring and administering funding awards:[138]

> **Recommendation #1:An independent Funding Office should be established to:**
> **a. assist with the management of the funding and cost award process through the provision of professional and administrative services to the funding/hearing panel;**
> **b. give impartial advice to and assist funding applicants in completing clear application forms;**

> c. **monitor issues funded in the hearing and administer funding awards;**
>
> The Funding Office would retain independent accountants and auditors to review funding applications and financial records and thereafter to assist with the administration and monitoring of funding awards. The funding panel's legal counsel could also be a resource to the Funding Office. At least one professional staff person knowledgeable about the issues in the hearing should also be retained to monitor issues in the hearing in much the same way as the Executive Co-ordinator for the EAB does in the DSP hearing. Administrative and support staff should also be hired. The Funding Office would be accountable to the administrative tribunal. Funding proponents would be expected to share part of the costs of the Funding Office, but the onus should not be on the proponents to continue the management of this office. The Funding Office should be provided by Government to support the tribunal.

The OEB's recommendation in this area focuses on "minor re-allocations":[139]

> There have been occasions where minor re-allocations of awarded amounts must be undertaken, ie. to accommodate the intervenor switching lawyers, during the period when the funding panel is probably functus and the main panel has not been officially determined. Confusion has arisen as to the Board's authority to alter its funding order to conform with the situation and any new legislation should clarify matters.
>
> **Recommendation 14:**
> **The Board should be empowered at all times to order re-allocations of amounts within the overall totals awarded and to order substitutions for persons named within the orders for others.**

The EAB focuses on constructing an appropriate administrative regime for the awards:[140]

> The IFPA does not explicitly define who has the ongoing responsibility for the administration of funding panel decisions and for supplementary funding decisions.
>
> The EAB does not have, nor has it been able to obtain, the resources to retain trained financial administrators. Although this problem has been partially resolved by having the Financial and Capital Management Branch (FCMB) of the MOE process all claims for funds pursuant to funding decisions, there is still a gap in the process.

When the funding panel has rendered its decision, it would normally be considered to have completed its task. However, intervenors frequently request interpretations of the eligibility of certain unanticipated disbursements, the reallocations of funds from one category to another as the focus of the hearing shifts, or as more or less expert or legal time is required or directions for the allocations of funding when there is a rift in a coalition. These are questions that cannot be answered by the Board staff or the staff of the FCMB. The funding panel has been dealing with these questions unless they are matters of supplementary funding in which case the hearing Board has been making the determination.

The Board has recently decided that each funding panel will retain the responsibility for the administration of its funding decision until the main hearing is underway. Once the hearing has begun and the hearing Board has become familiar with the parties and the issues, it will take over this responsibility for the remainder of the proceedings. The funding panel will assist the hearing Board in the early stages of the transfer of the administration by ensuring that the Board has a good understanding of the initial funding program. This approach will provide the hearing Board with the necessary understanding of the status of an intervenor's financial resources and funding allocation when supplementary funding applications are made. The negative aspects of the approach are: (1) the Board will not be familiar with the funding scheme envisaged by the funding decision; and (2) and the Board may not wish to be put in the position of appearing to control through funding decisions the amount and focus of the evidence to be brought before it. (However, the hearing Board may be placed in this position, in any event, when it is required to deal with supplementary funding applications).

This administrative approach has been implemented with the hope that an amended legislative scheme will eliminate the need for fragmentation of the administration of intervenor funding programs.

As mentioned above, the Board believes that a separate agency to deal with all aspects of intervenor funding is the sensible alternative to the present regime. It would have the appropriate expertise and resources to make both administrative and funding decisions.

**Recommendation 8:**
That the amended *Intervenor Funding Act* should clearly establish an administrative regime for intervenor funding programs, whether the funding decision-maker is an independent agency, the hearing Board or the combination of

> funding panel and hearing Board (as the IFPA prescribes at the present time).

**xiv) Role of Board Staff at the OEB**

ONGA provided a lengthy comment on the staff of the OEB and how its role ought to relate to other intervenors who seek funding:[141]

> The Board Staff at the OEB have participated in regulatory proceedings by testing the applicant's case and raising all relevant questions. To do so, Board Staff draw upon the expertise of over a dozen Technical Staff. On occasion, Board staff may also retain outside experts or consultants to assist the Technical Staff. The Technical Staff assigned to a particular case are responsible for assessing the applicant's evidence and briefing its Counsel. Thus, the Technical Staff act as a separate intervenor and, through their Special Counsel, advance an independent position.
>
> In some instances, Board Staff advance the position of ordinary consumers (residential and general service customers) who are faced with the dilemma of significant expenditures to participate in a hearing to realize a $30 saving on individual bills. In keeping with the adversarial nature of the public hearing process, Board Staff frequently take an opposing or differing position to the LDC [abbreviation for natural gas distribution companies] in many of the issues raised during a hearing. Nevertheless, ONGA acknowledges that such an approach by Board Staff is necessary to provide a full testing of the evidence so that the broad public interest can be determined.
>
> ONGA is of the opinion that the IFPA as applied to OEB hearings has resulted in some questions about the role of Board Staff in relation to the "public interest" intervenors. This opinion appears to be shared by others. The Funding Panel in E.B.R.O. 470 also expressed similar concerns:
>
> Traditionally, Board Staff has always taken a forefront in probing a utility's rate application. Since the mid-1980's Board Staff has become virtually a separate investigative body determining the extent and level of its own participation in rate cases. It is represented by its own counsel, has its own experts and consultants and together with as many staff as it feels necessary, it spearheads its own intervention. For this participation, the utility and eventually its customers are assessed about $250,000 in costs.

By far, the majority of these costs are devoted to Phase 1 issues which are virtually identical for all intervenors who are striving to keep rates as low as possible. However, by this Application, Mr. Horwood is asking to duplicate much of the effort of the Board Staff and in doing so, to potentially add the bulk of $153,427 to customers' costs.

Therefore, as the IFPA is set to expire in its current form, the role of Board Staff at the OEB needs to be clearly understood in any deliberations about a permanent intervenor funding mechanism at the OEB.

ONGA notes that other regulatory tribunals may not have the same infrastructure as the OEB. For example, the EAB may consider a multitude of environmental impacts and therefore, it cannot possibly keep all the technical staff it requires. A planning board, such as the Ontario Municipal Board may have neither technical staff or its own counsel. It depends upon the evidence of those presenting themselves when making a decision. Thus, the inherent assumption in this approach is that the public interest will not be impacted if there is no objection to the matter at hand.

Thus, it should be obvious from the foregoing that the public interest would not be served if Board Staff's role at the OEB is either diminished or abolished and replaced by the positions taken by intervenors who received funding under the IFPA.

As a final consideration, ONGA submits that the costs of the Board Staff's participation in its applications are also borne by the ratepayers. Any deliberations about the future of the IFPA at the OEB needs to keep this point in mind. To illustrate, in a main rate case of an LDC [abbreviation for Natural Gas distribution companies], the cost of Board Staff's participation is currently in the range of $175,000 to $250,000. Accordingly, to avoid the duplication of efforts and costs associated with an IFPA funded intervenor advancing the same issues of Board Staff, ONGA is of the view that it would further the public interest if IFPA funded interventions were complementary to Board Staff's.

As well, the OEB, in moving to a greater emphasis on the philosophy of "he who benefits from the regulatory authority should bear the costs", has also assessed the natural gas utilities for the fixed, administrative overhead of operating the OEB. The amount of these fixed costs which the LDCs collectively are being assessed is close to two million dollars.

Furthermore, the authority of the OEB to award costs to an intervenor under s.28 also contributes to the costs borne by

> the ratepayers. For example, in E.B.R.O. 470 (Main Rate Application for Union's fiscal 1992), the OEB directed Union to pay at the conclusion of the hearing approximately $160,000 to intervenors that participated in a manner which contributed to the Board's understanding of the issues (final amount will be determined by the Energy Returns Officer after a final review of the intervenor's reasonably incurred expenses.). None of these intervenors applied for funding under the IFPA.
>
> Figure 2 [not reproduced] provides a breakdown of the intervenor costs borne by the LDC's ratepayers in determining the public interest in a main rate case. Two observations are readily apparent from this diagram:
>
> - about 75% of the current costs are the result of the efforts by Board Staff to advance the general public interest;
>
> - the direct cost to the regulatory process of IFPA has added about 11% to the costs currently borne by an LDC's ratepayers.
>
> To the extent that an "IFPA intervenor(s)" duplicates the efforts of Board staff, it can be said that the ratepayers have been unnecessarily burdened by this redundancy.

[ONGA then recommends that s.7(1) be amended to include paragraph (c)]

> **(c)in the case of the Ontario Energy Board only where the Board Staff and Counsel cannot adequately represent an interest or advance the public interest with regard to an issue.**

The OEB did not make a numbered recommendation concerning Board staff though it did indicate "that Board Staff be used more extensively by intervenors for co-ordinating their interventions, determining the issues and saving customer costs." However, it also attached to its submission [142] a memorandum from the Chair, R.W. Macaulay, to the Attorney General Ian Scott written in 1987 when the IFPA was being contemplated. At that time Mr. Macaulay made the following observation concerning the Board Staff and constraints upon it:[143]

> A genuine attempt is made to ensure that the public understand that any person or group with an interest in a proceeding has free and open access to the staff, as well as Special Counsel and the expert witnesses retained for the

case, to assist that person or group in preparing and presenting an intervention. Broad consumer representation nonetheless remains sporadic and inconsistent. The benefits of adversarial interventions are, therefore, often lacking.

### xv) Scheduling and Location of Hearings and Other Assistance to Intervenors

Several respondents levelled criticism against the Boards (it seems particularly the EAB, because of the nature of its hearings) concerning the scheduling and location of hearings, especially a tendency to hold them in Toronto.[144] In addition, many respondents asserted that the Boards should more actively assist them regarding how to prepare and present a case. The Canadian Environmental Defence Fund (CEDF) study's recommendations summarize these concerns:[145]

> 7. The Board should provide criteria or guidelines to assist intervenors in their applications for supplemental funding.
>
> 8. The Board should make available to intervenors information about the funding panel and hearing process to allow community and public interest groups to better prepare their cases.
>
> 9. Hearings should be scheduled in consultation with intervenors to take into account their occupational needs and limitations and in particular for participants who farm, fish, trap, hunt or are members of cultural groups with practices that limit the times for participation.
>
> 10. The Boards should establish a consistent policy which directs hearing panels to choose hearing locations in consultation with intervenors. If hearing locations are to be changed and a transportation or time cost is imposed on intervenors, the added cost should be reflected in a supplemental funding award.
>
> 11. The intervenor funding hearing can be intimidating, particularly when citizens are not represented by counsel. The Board should assist unrepresented intervenors and reduce the formal atmosphere of the funding hearing.

In a previous sub-section (xiii) a recommendation of Ontario Hydro concerning the establishing of a Funding Office was described. Ontario Hydro also envisages that this Office would also have a role in assisting intervenors:[146]

> **Recommendation #9: The funding application should be redrafted to help ensure that parties submit clearer proposals.**
>
> In our experience, the work proposals have not been sufficiently informative. In addition to redrafting the application forms to elicit more detailed information, the use of clearer instruction forms and an opportunity to seek impartial advice from the Funding Office staff about how to complete the forms should contribute to clearer proposals. Efforts by applicants to improve the quality of the funding application with the assistance from the Funding Office will assist in coalition building and in identifying parties with similar interests.

In addition, groups and organizations mentioned the difficulty of co-ordinating their members and formulating policy within a short time. The Consumers' Association was quite specific in its explanation and recommendation:[147]

> CAC (Ontario) is a broad based consumer organization, and its interests are widespread. We have attached our Annual Report to provide you with a sense of our activities. Our mandate is to represent the consumer interest. The limitations of our staffing (one and a half persons in our Toronto office) and the range of issues our volunteers are involved in, often make it difficult to meet deadlines set by others. Our lateness in responding to your request is an example. The notice given is usually not sufficient for us to properly prepare. In light of the fact that parties involved presumably know when a Hearing will be required, a much longer period of notice should be provided.
>
> **Recommendation:**
> That at least 60 days notice be given for Hearings.

### xvi) Aboriginals

As discussed, the request for proposals that initiated this study particularly highlighted the need to explore how the process affected aboriginals and other minority interests and we made particular efforts, discussed at the beginning of this section, to encourage responses. We did not receive any submissions dealing with minority interests. We received two submissions dealing directly with aboriginal interests. One was from Nancy Kleer, Counsel to the Moose River/James Bay Coalition and the Nishawbe-Aski Nation/Grand Council Treaty #3/Teme-Augama Anishnabai in the Ontario Hydro D/SP hearings. Ms. Kleer's comments have been quoted at length elsewhere and will not be repeated here. The thrust of them is that intervenor funding is "absolutely critical" [148] to these interests but that there are problems including funding of elders, funding for meetings of political leaders, allowable disbursements for aboriginal clients[149] and procedures for obtaining funds.[150] Of course, these issues may not be peculiar to aboriginal interests but may affect them in particular ways, a comment reflected in a number of submissions.[151]

Nevertheless, we did receive two disturbing submissions that suggest the tension between being solicitous of interests not fully included within our justice system and other interests that, at least in some respects, view themselves as dealing with some similar problems. Judy Skidmore, Executive Vice President of Northern Community Advocates for Resource Equity (NORTHCARE) in response to questions concerning aboriginals raised in our Issues Paper alleges[152]:

> Aboriginal groups are better addressed than other communities in the same geographic area. Aboriginal communities have had their own lawyers for years with substantial funding unlike other Northern communities. Aboriginal communities are the least of the worries. Aboriginal communities have the best PR firms in the world working for them now. This question shows the obvious bias of the questionnaire and complete lack of awareness of the provinces geography. .... minority groups are all those rural and resources communities that are very unstable but have no funding to participate in this program.

See also David McRobert's submission dealing with participation at hearings.[153]

In contrast, the Canadian Environmental Defense Fund (CEDF) made a recommendation specifically dealing with aboriginals:[154]

> The Board should develop more flexible means of addressing funding claims by aboriginal groups. To that end, the Board should commission a study of the special requirements of

> aboriginal groups and develop specific methods of assessing aboriginal applications in a funding or environmental assessment hearing.

The second submission dealing directly with aboriginal interests was from Ovide Mercredi, National Chief, Assembly of First Nations. After referring approvingly to the CEDF recommendations he states[155]:

> However, it would be appropriate for the Board to invite aboriginal representatives to sit on the Board to advise them of the requirements of Native people and to assist with the development of specific criteria for processing of aboriginal applications for funding or environmental assessment hearings. Another option is, as the CEDF suggested, to commission a study. Our recommendation on this option is that the study be conducted by aboriginal people, perhaps under the direction of an aboriginal Board member.

### xvii) Municipalities

Two issues arose particular to municipalities. The first is whether municipalities, as intervenors (they could in certain circumstances be proponents), ought to be eligible for funding. Some respondents submitted that because municipalities have a capacity to raise money through taxes they ought to be disentitled to any funds for intervention.[156] Others take a more moderate position.[157] They point to the requirement of financial need and suggest that, particularly in the case of smaller municipalities in complex hearings, that their resources could be demonstrated to be inadequate so as to establish financial need:[158]

> In general, municipalities should not, as a whole, be excluded from funding. Such an approach may unfairly single out one group and there may exist smaller underfinanced municipalities that need intervenor funding in order to participate in the hearing process. Population and impecuniosity are both appropriate considerations. In addition, the municipalities should have a direct interest in identical issues which may not otherwise be canvassed. However, in funding municipalities and other (non Crown) public agencies, an allowance (reduction) should be made from the point of view that the municipality ought to be

> incurring some or all of the expenses as part of its ordinary day-to-day responsibilities. Similarly, if the municipality is addressing issues that have little or nothing to do with its mandate, funding would not be appropriate. The latter circumstance is more likely to affect public authorities and regulated bodies other than municipalities if the hearing relates to activities within the municipal boundaries.

A similar point was made regarding industrial or trade groups:[159]

> A similar judgement must be made in each case in regard to consumer groups or trade associations. It is inappropriate to fund associations of large commercial and industrial consuming or trade groups that have the power to raise monies from members that are relatively wealthy and have a pecuniary interest at stake. This should also hold true for umbrella groups comprised of public or quasi-public entities that can generate revenue through taxes or rates. (It should be noted that the Municipal Electrical Association received $3 million of funding in the D/SP case despite the capability of its 300 members to raise money in rates charged to their 7 million customers.) It does appear to us to be quite appropriate to fund associations that are reliant on voluntary membership fees or donations from its members, each of whom have a minor pecuniary interest.

The second issue regarding municipalities is the alleged preference they have in funding hearings vis à vis other intervenors. John Jackson coordinator of the Ontario Toxic Waste Research Coalition in the Ontario Waste Management Corporation hearing before the Joint Board, recounts from that perspective, the comparative treatment of groups and municipalities[160]:

> Frequently both citizens' groups and municipalities may be intervenors at a hearing. Usually, the effect of forcing these to work out of the same pot of money is to create an uneasy alliance and to dramatically lessen the role of citizens in the hearing process.
>
> Rarely are the interests of citizens' groups in a hearing the same as those of a municipality. The citizens' group is usually much more involved in the issue, single-minded and adamant in its opposition to a proposal. The municipality, by contrast, although it may officially be opposed, is often more concerned about compensating the municipality should the project go ahead. Also municipal politicians and administrators have so many other topics and crises to worry about that they reach the point of simply wanting to get the hearing off their plate. These differences in perspective

> usually lead to considerable suspicion between citizens' groups and municipalities that make it extremely difficult for them to work together.
>
> In addition, municipal politicians and civil servants rarely look at members of citizens' groups as their equals. This means that if resources are shared it is difficult for the citizens' group to do more than tag along for the ride. This completely defeats the purpose of intervenor funding -- to give citizens' groups a stronger voice at hearings.
>
> At our original funding hearings, the funding panel tried to force the Coalition and Region of Niagara and the Township of West Lincoln to submit a joint funding application. The effort to put together such an application was a disaster. We decided to withdraw from the effort and risk having the funding panel give us no funding. The panel did fund us -- at a level almost equal to the Region and Township. This allowed us to maintain our independence and to become equals. As a result, these three parties now work very closely together and we have pooled our expert witness monies. But this was done voluntarily from the position of equals, rather than from a position of weakness as a result of being forced to do it by a funding panel.

### xviii) Appeal/Review

The submissions concerning appeals and reviews of Board decisions related to intervenor funding dealt with the nature and extent of the appeal/review process and with funding appeals and reviews. The Public Interest Advocacy Center (PIAC) makes several suggestions regarding appeals.[161]

> **The appeal provision of the Act should be clarified. In particular, it should be made clear that appeals on a matter of law are available from original funding decisions (on eligibility) alone, and not supplementary funding decisions.**
>
> This recommendation follows from the more administrative nature of a supplementary funding decision. Questions of eligibility will already have been determined at this stage and only the adequacy of the award will be at issue. Further, the clear denial of an appeal on matters of law from supplementary funding decisions removes a number of practical difficulties which would arise for the continuation of the hearing should a supplementary funding applicant launch an appeal of the decision. However, there should be some supervision of supplementary funding decisions (apart from judicial review) as noted in

> recommendation twenty...[dealing with political "appeals" under enabling statues]
>
> **The Act should more clearly state that decisions made by a board under the IFPA are decisions of the Board within the meaning of the Boards' enabling or founding legislation.**
>
> This would indicate that political "appeals" under those enabling statutes are available even in the case of a supplementary funding decision. This is appropriate to ensure that the broad policies of the government are followed by these Boards, especially on matters of intervenor funding. An inappropriate policy decision in an intervenor funding award may in effect prevent a board from being informed on matters which the political masters of those boards consider to be in the public interest.

The EAB, in contrast, was quite explicit that there should be no "political appeals":[162]

> Under the IFPA, neither initial funding decisions nor supplementary funding decisions are subject to appeal to the Cabinet or to the Minister. However, it has been suggested that the Board, acting as the funding panel, is subject to the appeal provisions under its enabling legislation the *Environmental Assessment Act*.
>
> The availability of an appeal to the Minister or the Cabinet could possibly lead to an appeal of every decision of a funding panel which found an intervenor to be ineligible for funding or did not allocate the full amount requested. In the Board's view, the availability of an appeal of the initial funding decision to the Ontario Court on matters of law and the rules of natural justice together with the availability of judicial review of a Board decision on supplementary funding applications provide sufficient safeguards to ensure fairness.
>
> **Recommendation 5**
>
> (b)That the amended *Intervenor Funding Act* explicitly provide that an appeal of the decision of a funding panel is available to the Ontario High Court on a question of law and not to the Minister or to the Cabinet.

Finally, Ontario Hydro urges that appeals should be made within 28 days of the funding decisions because "[w]ithout such a limit significant disruptions to the hearing's schedule may occur".[163] Related to this both the OEB[164] and the ONGA[165] recommend that an appeal shall not operate as a stay of proceedings.

The second issue, concerning funding for these processes, comes from D.Poch:[166]

> **Provision for funding of appeals and judicial reviews** - Currently it is possible for a monied intervenor to use the available appeal or judicial review remedies to attack a funding decision and in so doing drain or threaten to drain the resources of the funded intervenor. Some intervenors could not withstand the costs risks of such a challenge and would be forced to withdraw despite their having received intervenor funding and having a positive view of the likely outcome in the courts.
>
> Similarly, applications for judicial review of hearing board decisions (unrelated to the funding decision) in the midst of a lengthy hearing can have serious implications. A provision allowing for applications to the funding panel (or after commencement of the hearing to the hearing panel) for assistance in such cases would be an appropriate safeguard. A provision allowing the applicant to seek such funding from an independent panel where the ordinary funding application would be before the panel whose decision is under attack would provide an avenue free of any apprehension of bias.

### xix) Special Rules for Complex Hearings

Submissions concerning procedures for relating issues in the funding hearing to issues in the main hearing particularly in complex hearings have been canvassed earlier and will not be repeated here (sec.VI.E.(v)). The nub of that concern is that the funding panel does not fund issues that are never dealt with in the main hearing or that it fails to fund issues that are present in the main hearing and that some means be provided to allow intervenors to participate in ascertaining the issues as the panel in the main hearing determines them.

Another submission recommended that in complex cases there be funding for "participation in mediation and similar settlement oriented efforts. In complex cases intervenors require significant expert assistance in such efforts. This is an important opportunity for intervenor funding to shorten the hearing process."[167]

Ontario Hydro focuses on the need for periodic review of funding decisions, "particularly in large and lengthy hearings":[168]

> **Recommendation #3 There should be a bi-annual or otherwise periodic review by the hearing panel of the issues for which funding was awarded.**
>
> The purpose of these reviews would be to amend past funding decisions in light of the further identification and narrowing of issues. There must be a mechanism, particularly in large and lengthy hearings to revisit the issues which were initially thought to be material but which the hearing panel later determines will not contribute substantially to the hearing and to halt unnecessary expenditures or to consider reallocation of the funds awarded.

Ontario Hydro also believes that funding should not be staged and the applicant should bear the risk of an unsuccessful application:[169]

> **Recommendation #4: Funding applications should be done in a single stage and at the applicants risk and expense.**
>
> In our experience, a two-staged funding process has caused significant delays, has not resulted in clearer work plans and has not necessarily encouraged coalition-building. Indeed more coalitions broke up in the DSP after the first stage than were created.
>
> A single staged funding process, particularly if the major issues in the hearing have already been identified by the hearing panel and if coalition-building has been undertaken at the earliest preliminary meetings, should avoid delay and ensure clear proposals. The expectation that parties submit work proposals on spec is no different than the expectation that applicants for research or government grants must prepare their applications at their own expense.
>
> **Recommendation #5: Major issues in the hearing should be articulated during the granting of party status and prior to the granting of intervenor status.**
>
> At the time party status is sought, the hearing panel should require parties to justify their request for status by describing the issues of interest to them. The hearing panel should establish a list of issues based on its review of the documentation, and the submissions made to it by the proponent and applicants for party status. An issue list is

> essential in determining which issues ought to be funded, and would also encourage coalition-building, which in our view has not been particularly successful when carried out later, ie. during the funding process.

Finally, the Consumers' Association provided a specific recommendation dealing generally with complex proceedings:[170]

> a) There should be a different process for large multi issue/multi year hearings like the EAB Ontario Hydro DSP hearings:
>
> i) Initial and continuous scoping;
> ii) Initial funding award;
> iii) Instream funding awards;
> iv) Post hearing cost achievement awards;
> v) Monitoring of success/failure.
>
> The larger and longer the case, by definition the broader and less focused the issues. Therefore the level of risk associated with the funding award and the activities of each intervenor is directionally higher.
>
> The Act must ensure a better balance between intervenor need for predetermined funding to hire experts and flexibility to provide instream funding and sanctions for those who go off on a frolic of their own and/or do not do what they expect to do.

## NOTES TO SECTION VI

1. Letter of Bruce Thom Q.C., Commissioner of Corporate Services, City of Mississauga, November 29, 1991.

2. Letter of Walter Brown, 12 November 1991, letter T.S. Jones, Mayor [at that date] Town of Dryden, 25 November 1991; letter Judy Skidmore, Executive Vice President, Northern Community Advocates for Resource Equity (NORTHCARE), November 20 1991 and January 21, 1992.

3. Letter, Larry Solomon, Energy Probe, November 12, 1991, attaching letter of Mark Mattson, Counsel to Energy Probe to Honourable Ruth Grier, Minister of the Environment, April 3, 1991.

4. Susan McWilliams, "Ontario's Intervenor Funding Project Act-The Experience of the Ontario Energy Board", (August, 1991 A paper presented to the Administrative Law and Advocacy Summer School, Ministry of the Attorney General) quoting EA-90-01 Environmental Assessment Board, Ontario Hydro Demand/Supply Plan Hearing's, Transcript of Preliminary Hearing dated March 5, 1991, 231.

5. Speech to the Natural Resources and Energy sub-section of the Canadian Bar Association (Ontario) on Ontario's Energy Policy on February 28, 1991.

6. Submission of Stephen Salaff, November 15, 1991.

7. Letter of A. Dickinson, Executive Director, Association of Major Power Consumers in Ontario (AMPCO), 6 December 1991. See also letter of Neil Slack, Enviromex Systems, 2 January 1992.

8. Letter of George Davies, Deputy Minister of Energy, January 9, 1992.

9. Ibid.

10. Letter of J.C. Butler, Vice-President-Consulting, A.E. Sharp Associates Ltd., 30 December 1991.

11. Letter of Karl Braeker, Ontario Federation of Agriculture, Regional Director for Grey South for Grey County Federation of Agriculture, November 20, 1991. (emphasis in original). See also Archibald Kimpe, November 27 1991; William Dennis, n.d.; Harvey Houle, n.d.; Dolf Wynia, Canadian Institute of Forestry, December 5, 1991.

12. Submission of Colleen Cooney on behalf of WASTE NOT, (n.d) (emphasis in the original). See also, for example, C. Benson, 22 November 1991; Atikokan Citizens for Nuclear Responsibility; Kelly Clune, Citizens Acting Now (n.d.);letter Robert Gooch, January 16,

1992.

13. Submission of Kelly Clune on behalf of Citizens Acting Now, (CAN), (n.d.) See also C. Benson, Forest for Tomorrow, November 22, 1991; Rosalie Bertell, International Institute of Concern for Public Health, December 6, 1991; Bruno Seppala, December 13, 1991.

14. See, for example, Deep River Area Economic Development Department (n.d.); letter of Karl Braeker, Ontario Federation of Agriculture, Regional Director for Grey South for Grey County Federation of Agriculture, November 20, 1991; Atikokan Citizens for Nuclear Responsibility, footnote 12, supra; Submission of Professor Ron Pushchak, (n.d.); see certain submissions attached to letter of Dr. P. Byer, Chair of the Environmental Assessment Advisory Committee, November 28, 1991; R. Horwood, PIAC, footnote 29, infra; H. Campbell, CEDF, footnote 78, infra; J. Huzar, CAC(Ont), footnote 28, infra; letter of J. Springer, Eco-Action, January 13, 1992; R. Modlich, Women Plan Toronto, January 13, 1992; letter John Martel, Chair, Public Advisory Committee, Essex-Windsor Waste Management Committee, (PAC-EWWMC) January 17, 1992, with attachments; letter R. Lindgren, Counsel, Canadian Environmental Law Association, January 23, 1992 with attachments. Mr. Lindgren while giving specific examples of positive impacts of IFPA, recognizes the difficulty of drawing firm conclusions:

> Given the relatively short history of the IFPA, it is somewhat difficult to document or quantify a direct causal relationship between the availability of intervenor funding under the Act and the quality of decision making. In addition, the determination of what constitutes a "good" decision is highly subjective and value laden. However, it is CELA's opinion that the quality of decision making is generally enhanced by the availability of intervenor funding.
>
> For example, the provision of intervenor funding to CELA's client in the Halton landfill case permitted the client (the West Burlington Citizens Group) to retain a hydrogeologist who was instrumental in the Joint Board's decision not to approve Site F primarily on hydrogeological grounds. Similarly, intervenor funding in the Timber Management hearing has permitted CELA's client (Forests for Tomorrow) to, inter alia, hire professional foresters who strongly criticized the proponent's silvicultural evidence, and who offered many detailed recommendations for silvicultural terms and conditions. No other party presented such evidence, and without intervenor funding the Environmental Assessment Board would have been deprived of this important technical evidence which directly contradicted the proponent's position.
>
> While these are not IFPA cases, they nevertheless provide tangible evidence for the widely held view that intervenor funding improves decision-making.

15. Greensville Against Serious Pollution (G.A.S.P.), April 27, 1991, attachment to letter of Dr. Phillip Byer, Chair to the Environmental Assessment Advisory Committee, November 28, 1991. Dr. Byer provided copies of all submissions to the Committee responding to the Ministry of the Environment's discussion paper Towards Improving the Environmental Assessment Program in Ontario (TIEAPO) with regard to its recommendations regarding intervenor funding. See also letter of John Jackson, January 7, 1991.

16. Submission of David Poch, Starkman, Poch; December 12, 1991

17. Letter of Nancy Kleer, Morris/Rose/Ledgett, December 2, 1991.

18. Letter of Peter Staadecker, Product Manager, Ammonia, ICI Nitrogen Products, November 18, 1991.

19. Letter of Paul Pinnington, President Ontario Natural Gas Association (ONGA - Consumers; Union; Centra). January 24, 1992. attaching The Intervenor Funding Project Act In Matters Before The Ontario Energy Board: Considerations For the Future (Post April 1992), p.32.

20. Submission Heather Campbell, December 20, 1991. Ms. Campbell indicated the basis of her submission: " The following comments are based on input received from counsel at the Ministry of the Environment who have had some involvement with the Intervenor Funding Project Act and the funding process, generally before the Environmental Assessment Board and/or Joint Board. The comments are not submissions on behalf of this Branch of the Ministry."

21. Eunice Skinner, Ontario Hydro, Acting Manager Public Hearings and Government Relations, January 20, 1992 with attachments.

22. Paula Kulig "Intervenor Funding Project Under Review", Law Times, November 25-December 1, 1991, 8.

23. Press Release announcing this study, November 4, 1991.

24. Letter of Mary Munro, Executive Vice-Chair, Environmental Assessment Board, January 24, 1992, attaching Intervenor Funding Project Act, 1988 Comments by the Environmental Assessment Board, January 24, 1992, 2.

25. Comments by the Ontario Energy Board on the Intervenor Funding Project Act, 1988, January 28, 1992, 1-2.

26. Supra, footnote 3.

27. Ibid., and accompanying text in main body.

28. Submission, Joan Huzar, President, Consumers' Association of Canada (CAC) (Ontario), December 16, 1991.

29. R. Horwood, The Ontario Intervenor Funding Project Act, 1988: Its Review and Reform and a Model to Provide for Public Interest Participation in Regulatory Proceedings in Canada (PIAC), (July 1991) This document is a separate report and not a submission.

30. Supra, footnote 28 and accompanying memorandum of Rosalie Daly Todd, November 29, 1991.

31. Supra, footnote 29, 88.

32. See letter of Robert Holden, Provincial Director, Ontario Legal Aid Plan, December 16, 1991 enclosing a copy of the Report of the Group Applications and Test Cases Sub-Committee and commenting:

> "Though I am not in a position to reply to the issues paper that you enclosed with your letter, I am pleased to send you a copy of a Report that was... in Convocation on September 27, 1991, that I trust you will find useful.
>
> That Report was prepared by a Sub-Committee of the Legal Aid Committee that has, over the years, considered a number of applications for legal aid from groups of people who require assistance in a variety of matters, including environmental matters. That Sub-Committee is called the Group Applications and Test Cases Sub-Committee.
>
> In recent years, the cost of environmental matters, together with the complexity of determining what a reasonable cost was, caused the Sub-Committee to consider whether it was appropriate for the Ontario Legal Aid Plan to continue to provide funding in these matters.
>
> After a great deal of reflection, the Sub-Committee reported its conclusion to the Legal Aid Committee and to Convocation that it was not appropriate for the Plan to continue to provide such representation. At the same time, the Sub-Committee recognized that, once legal aid funding was no longer available, some citizens groups might not be represented in important cases involving significant public interest.
>
> You will see that the Sub-Committee referred to the Intervenor Funding Project Act in its report and expressed the hope that the necessary funding might be found either through that Act of through another mechanism for persons who required representation."

33. See footnote 15, supra.

34. See P. Byer, Chair EAAC, November 28, 1991 and certain of the attached submissions, footnote 15, supra. See also EAB submissions -March 25, 1991, pp.7-9.

35. See, A. Dickinson, footnote 7, *supra*.

36. David Poch, footnote 16, *supra*.

37. See Karl Braeker, Ontario Federation of Agriculture, November 20, 1991, footnote 11, *supra*; James Hurlburt, Lindemark Farms, n.d.; Robert Hawkes, OMB, December 10, 1991; James Harvey, Gowling Strathy, December 13, 1991; Joan Huzar, Consumer Association of Canada, December 16, 1991, footnote 28, *supra*.

38. See for example, Joseph Castrilli, December 2, 1991; *Report Regarding Environmental Cases to the Legal Aid Committee* by the Group Application and Test Cases SubCommittee, September 15, 1991; see also R. Lindgren, CELA, footnote 14, *supra*.

39. Canadian Bar Association, *Submission Regarding the Ontario Municipal Board to the Standing Committee on Government Agencies,* (September, 1991), p.6.

40. Letter from Robert Hawkes, Special Assistant to the Chair, OMB, December 10, 1991, responding on behalf of members who have heard intervenor funding applications but not on behalf of the Board as a whole.

41. Letter of John Kruger, Chair OMB, to Carmen Rogers Counsel, Policy Development Division, Ministry of the Attorney General, January 17, 1992, attaching *Discussion Paper on the Applicability of Intervenor Funding to the Work of the Ontario Municipal Board*, (January 6, 1992). See also Paul Pinnington, ONGA, footnote 19, *supra*, 32.

42. *Supra*, footnote 32.

43. *Ibid*, no page numbers in document.

44. *Supra*, footnote 20. See also submission of Pollution Probe attached to letter of Paul Muldoon, Counsel, 13 January 1992:

> Recommendation no. 2: The application of the *Intervenor Funding Project Act, 1988* should be extended to the Ontario Municipal Board and the Environmental Appeal Board. Moreover, a provision should be included such that the Act could be extended to any board, commission or tribunal in the province upon application and with the meeting of some threshold test.

45. Susan McWilliams, footnote 4, *supra*, and David Poch, footnote 16, *supra*.

46. Susan McWilliams, *ibid*, 18.

47. David Poch, footnote 16, *supra*.

48. Susan McWilliams, footnote 4, *supra*, 27.

49. David Poch, footnote 16, supra. p.2-3.

50. Mary Munro, EAB, footnote 24, supra, 3-5.

51. OEB, footnote 25, supra, 21-22.
A variation of this recommendation by ONGA would have a member of the Hearing Panel (see Paul Pinnington, ONGA, footnote 19, supra, 30-31:

> s.4(3) of the IFPA prohibits a member of a funding panel from being a member of the Hearing panel. ONGA understands that such overlap between the two panels was thought to prejudice the outcome of the proceeding. ONGA submits that the regulatory process would be better served if a member of the Hearing Panel was on the Funding Panel. Such overlap would help ensure that:
>
> - funding is being awarded to qualified and relevant public interest groups;
> - the participation of an intervenor is consistent with intervenor's declaration of interest at the funding hearing;
> - the intervenor's participation in the hearing remains focused;
> - there is no duplication of effort among the hearing participants; and
> - the ratepayers -- who ultimately bear the costs of the process -- are receiving responsible consideration.
>
> Further support for this overlap can be discerned from the following reasoning:
>
> - supplementary awards for funds are decided by the Hearing Panel. Considering that a supplementary funding conceivably could be larger than the original award, the incongruity in the current legislation makes no sense; and
> - the Hearing Panel determines the cost award, from which the advance funding award is deducted.

52. Eunice Skinner, Ontario Hydro, footnote 21, supra:

> Recommendation #2 **The hearing panel should determine funding eligibility and quantum.**
>
> There is no apparent benefit and there appear to be disbenefits associated with the separation of funding panel and hearing panel. Particularly with complex undertakings, the funding panel may not be knowledgeable about matters in dispute and may have difficulty determining which issues are relevant and material and ought to be funded. The principle of separation of funding and hearings panels should be revisited.
>
> Alternatively, a two member funding panel, one member of which

is cross-appointed from the hearing panel would (1) guarantee adequate communication generally; (2) ensure that issues are commonly understood; and (3) alleviate the heavy workloads on one-member funding panels.

If the funding panel and hearing panel are not combined, the funding panel must have access to the hearing panel by way of a stated case when it cannot determine whether or not an issue is relevant and fundable. In this event, the hearing panel would also determine the quantum of funding.

53. Mary Munro, EAB, footnote 24, *supra* 12-13; OEB footnote 25, *supra* 15.

54. *Ibid*, 9-11.

55. OEB, footnote 25, *supra*, 20-21.

56. Eunice Skinner, Ontario Hydro, footnote 21, *supra*.

57. Mary Munro, EAB, footnote 24, *supra*, 9-11.

58. R. Horwood, PIAC, footnote 29, *supra*, 98-99, Reco #18, #19 #20.

59. OEB, footnote 25, *supra*, 12-13.

60. See footnote 15, *supra*

61. James Harvey, December 13, 1991; Keith Campbell, n.d.

62. The Environmental Assessment Board, *Recommendations on the EA Task Force Report Towards Improving the Environmental Assessment Program in Ontario*, (March 25, 1991), 7-8.

63. Letter of Ed Cornies, Director Essex-Windsor Waste Management Committee, November 29, 1991.

64. J. Martel, PAC EWWMC, footnote 14, *supra*.

65. Eunice Skinner, see footnote 21, *supra*.

66. Mary Munro, EAB, footnotes 24, *supra*, 3-5.

67. Susan McWilliams, footnote 4, *supra*, 14-17.

68. Lorraine Huinink, *An Evaluation of the Funding Denials Under the Intervenor Funding Project, 1988*, (1991), p.110.

69. David Poch, footnote 16, *supra* and PIAC, footnote 29, *supra*, 93 Reco #6 and #8, p.4.

70. OEB, footnote 25, supra, 12-13.

71. Mary Munro, EAB, footnote 24, supra, 8-9.

72. Section 7(2) of the IFPA states;

> (2) In deciding whether to award intervenor funding to an intervenor, the funding panel shall consider whether,
>
> (a) the intervenor represents a clearly ascertainable interest that should be represented at the hearing;
>
> (b) separate and adequate representation of the interest would assist the board and contribute substantially to the hearing;
>
> (c) the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;
>
> (d) the intervenor has made reasonable efforts to raise funding from other sources;
>
> (e) the intervenor has an established record of concern for and commitment to the interest;
>
> (f) the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing;
>
> (g) the intervenor has a clear proposal for its use of any funds which might be awarded; and
>
> (h) the intervenor has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award.

73. Ibid.

74. OEB, footnote 25, supra, 6-7.

75. Ibid, 10.

76. P.Pinnington, ONGA, footnote 19, supra, 31.

77. OEB, footnote 25, supra, 11.

78. See, PIAC, footnote 29, supra, 93-94, Reco #9 & #10 and see also Heather Campbell, Intervenor Funding and the Intervenor Funding Project Act in Ontario. A report prepared by the Canadian Environmental Defence Fund for the Ministry of the Environment Ontario (May, 1991) (Campbell (CEDF)), 124, Reco 4 urging clarification.

79. David Poch, footnote 16, supra.

80. P. Pinnington, footnote 19, supra, 29-30.

81. Letter from A. Dickinson, Executive Director, Association of Major Power Consumers in Ontario (AMPCO), December 6, 1991.

82. Letter from Martin Campbell, Beard, Winter, Counsel to the Niagara Peninsula Conservation Authority, December 9, 1991.

83. J. Huzar, CAC (Ont), footnote 28, supra, attaching letter of Robert Warren, Weir & Foulds, November 28, 1991, p.16.

84. Eunice Skinner, Ontario Hydro, see footnote 21, supra.

85. See Susan McWilliams, footnote 4, supra, 25 and Heather Campbell, footnote 20, supra; Eunice Skinner, see footnote 21, supra.

86. K. Braeker, footnote 11, supra.

87. Letter from R. Stephen Thompson, Agent in lieu of Counsel for Ontario Federation of Agriculture, at the Ontario Hydro D/SP hearings, November 15, 1991.

88. Letter from David McRobert, formerly of Pollution Probe, December 10, 1991, p.3.

89. R. Horwood, PIAC, footnote 29, supra, 95 Reco #12 and #13. Recommendation twelve would eliminate ss.7(s)(c) and (d). Recommendation thirteen offers this alternative (p.95):

> **Alternatively, if some provisions corresponding to paragraphs 7(2)(c) and (d) are retained in the new Act, then there should be some statutory guidance as to their interpretation. This guidance might be by the way of a new subsection or paragraph as follows:**
>
> **"nothing in this Act shall be interpreted as requiring that an intervenor wholly or partially to finance, or contribute financing in kind to, its participation in any proceeding as a condition of eligibility to receive funding."**
>
> This provision should imply that different interpretations of subsection 7(2)(c) and (d) are appropriate depending on the nature of the intervenor. Pure public interest intervenors may have no reasonable expectation of making a contribution. Accordingly, sections 7(2)(c)(d) or their equivalents in a new Act would normally have no application to them. On the other hand, a mixed public/private interest intervenor may be able to finance its participation partially. Accordingly, provisions corresponding to paragraphs 7(2)(c)(d) might be used to require a partial contribution to an intervenor

funding award (which may be recovered in the costs award). They would also make it clear that the undertaking of "reasonable efforts" by an intervenor to finance its participation partially should end the inquiry under these provisions. Hence, they should also make it clear that the indirect partial self-financing of participation through fundraising activities which may consume inordinate amounts of time for little anticipated returns should not be a condition of eligibility. This latter point may be made explicit in the Act or preamble.

90. David Poch, footnote 16, supra.

91. J. Huzar, CAC (Ont), footnote 28, supra, p.4.

92. OEB, footnote 25, supra, 18-20.

93. Supra, footnote 3.

94. Ibid, 3.

95. Letter from Rev. Kevin Logie, Stewardship Advocacy Coalition of Ontario, 26 November 1991.

96. L. Huinink, footnote 68, supra, 109-110 and D. McRobert, footnote 88, supra.

97. See, S. McWilliams, footnote 4, supra, 26.

98. See, J. Huzar, footnote 28, supra, attaching letter of K. Rosenberg, p.4.

99. See, D. Poch, footnote 16, supra.

100. Letter Paul Vogel, Cohen, Highley, Vogel & Davison, 3 December 1991, attaching letter of Mr. Ian Goudy, 24 November 1991.

101. R. Horwood, PIAC, footnote 29, supra, 97, Reco 14.

102. J. Huzar, footnote 28, supra.

103. Ibid, and Nancy Kleer, footnote 17, supra, and D. McRobert, footnote 65, supra.

104. J. Huzar, footnote 28, supra, attaching letter of K. Rosenberg, p.3-4.

105. N. Kleer, footnote 17, supra, p.3.

106. J. Castrilli. Intervenor Funding - Intervenor Funding Project Act, 1988 (30 April 1991, Insight), 21-23.

107. See attachments to letter of P. Byer, Chair Environmental Assessment Advisory Committee, 29 November 1991, attaching submissions on Towards Improving the Environmental Assessment Program in Ontario, footnote 15, supra and see section I.D. supra for explanation of this study and its relevance to this Report. The two pertinent attachments are: (1) Regional Chairman of Ontario, (2) Dow Canada.

108. Mary Munro, EAB footnote 24, supra, 5-6.

109. See submissions of Professor R. Pushchak (no date), Citizens Acting Now (CAN), footnote 13, supra, Nancy Kleer, footnote 17, supra, H. Campbell, CEDF, footnote 78, supra, 124, Reco #3.

110. J. Huzar, footnote 28, supra, attaching letter of Robert Warren, 28 November, 1991, p.2.

111. R. Lindgren, CELA, see footnote 14, supra.

112. D. Poch, footnote 16, supra and Heather Campbell, footnote 20, supra; Eunice Skinner, see footnote 21, supra.

113. Letter of Hugh Fletcher and Jack Gardiner on behalf of the Middlesex Oxford Landowners Committee Association (MOLCA), 18 December 1991, p.3.

114. R. Horwood PIAC, footnote 29, supra, 92 Reco. 4.

115. Mary Munro, EAB, footnote 24, supra, 21.

116. OEB, footnote 25, supra, 26.

117. Ibid, 25.

118. H. Campbell, footnote 20, supra

119. D. Poch, footnote 16, supra, J. Huzar CAC (Ont), footnote 28, supra, H. Campbell, CEDF, footnote 78, supra, 125, Rec 6.

120. N. Kleer, footnote 17, supra.

121. H. Campbell, CEDF, footnote 78, supra, 123, Reco 5. and see D. Poch, footnote 16, supra.

122. R. Horwood, PIAC, footnote 29, supra, 96 Reco 15.

123. Ibid., Reco 16.

124. OEB, footnote 25, supra, 16:

> Recommendation 7:
>
> Any successor to the Act should provide that funding

should include those disbursements found by the panel to be reasonable and necessary for the applicant's intervention.

125. Mary Munro, EAB, footnote 24, supra, 12:

> Recommendation 6:
>
> That the amended Intervenor Funding Act include provisions to allow the funding decision-maker to award intervenor funding for the disbursements of legal counsel, consultants, expert witnesses and the intervenor as necessary for the representation of the interest.

126. S. McWilliams, footnote 4, supra, 30-33 (footnotes omitted).

> Supplementary Funding must be approved by the hearing panel as the hearing progresses. The hearing panel is in a better position than the funding panel to assess the reasonableness of the proposed expenditures as it is more familiar with the issues, what is happening at the hearing and also has an opportunity to assess the contribution made at the hearing by the intervenor. The hearing panel in considering whether a supplementary funding award ought to be made requires an applicant to account to it for funds spent under the original award. In proceedings before the OEB this control of supplementary funding has not presented much difficulty. However, in hearings before the Joint Board, intervenors have object that such disclosure would reveal their strategy to the proponent and compromise their intervention.
>
> In response to the application for supplementary funding of the Consumers' Coalition in the Union Gas Limited rate of proceeding, E.B.R.O. 470, the Board denied funding for costs incurred for issues not originally funded. It stated that,
>
>> ..the purpose of the IFPA is to provide some advance funding to eligible public interest groups to enable them to participate in proceedings before the Board. However, the use of the funds must be controlled, limited and properly accounted for, by the intervenor to what is authorized . If this were not the case, intervenor funding could be misapplied resulting in a burden for gas utility ratepayers who ultimately bear the costs. The Funding Panel of the Board is given the mandate under the IFPA to define the extent of the funding prior to the hearing.
>>
>> It is the Board's view that having received funding for certain specific issues, the funding applicant should not expect to be automatically funded under the funding legislation for expenses in relation to other issues. To interpret the application of the IFPA otherwise would

> result in the Board losing the discretion given to it under the IFPA in relation to intervenor funding and under Section 28 to the Ontario Energy Board Act in relation to awarding costs.
>
> In the Board's opinion, if the Consumer's Coalition wished to be funded to deal with additional issues which went beyond those stated on the original application and approved by the Funding Panel, it should have made a supplementary application to the Board before it incurred such costs.

The Board awarded supplementary funding where there had been unforeseen or changed circumstances i.e.,longer than anticipated sitting hours. Nonetheless, the Board reminded the intervenor that the costs incurred relating to new issues are a matter to be left to the submission for costs at the end of the hearing.

In the Ontario Waste Corporation Facilities hearing, the Joint Board criticized the failure of three intervenors who brought supplementary applications to follow the budgets they had filed with the original funding panel;

> The assumption seemed to be that applicants could spend *according to what they believed they needed* to mount their case, without regard to a budget; when the funds were exhausted they could simply apply for more. ... The Board does not believe that this approach to the spending of funds awarded by the Funding Panel was intended by the Legislature and this Board does not want to encourage it.

In that proceeding, the Board observed that;

> One of the difficulties for the parties and the Board in these applications is that intervenor funding is [a] relatively new and still evolving aspect of administrative law. The Act came into force in 1989. There have been a number of applications for original funding under s.7 but, as noted above, few applications for supplementary funding under s. 12. In considering the matters raised, the Board is in largely uncharted waters, and there is little to guide it.

The Joint Board in the Ontario Waste Corporation Facilities proceeding, however, followed the position taken by the OEB in E.B.R.O. 470 and chastised the intervenors thus,

> Here, the applicants depleted their award for legal costs by spending much more time in preparation for the hearing than the award contemplated. With respect to both legal and technical consultant/coordinator costs, and the delay in the start of the hearing proper until February, 1990,

> it appears that the work expanded to fill the time available. It may be that the extra preparation was necessary, for matters unanticipated at the time of the O.C. [Orders-in-Council] funding hearing...
>
> The Board recognizes the reality that an intervenor could prepare for a hearing of this nature forever. It is a large, complex, multi-faceted hearing, pitting the applicants against a proponent that has had tens of millions taxpayer dollars, and years to mount its case.
>
> Nonetheless, the legislation, in the Board's view, is not intended to provide intervenors with an unlimited source of funds, to spend in furtherance of their intervention as they deem fit. Whether the proponent of an undertaking is a public sector proponent, in which case the funds come from taxpayers, or a private sector proponent, it should be able to expect that intervenors will treat the original award with respect, recognizing that it is intended to take them through the entire hearing, and that further funding will be awarded only for good reason.

> Although the Joint Board recognized that the original award was made on incomplete information, that circumstances change in a hearing, and that , in some areas, the Hearing Board is in a better position that (sic) the funding panel to assess whether the funding requested meets the section 7 criteria, it was of the opinion that,
>
> > it is not enough to bring an application for supplementary funding and say "The case was more complex than we thought." The Board needs concrete information: what has happened that was not anticipated? What expense resulted from that unanticipated event?

Earlier Ms Mc Williams described the ultimate result of the supplementary funding application before the Joint Board:

> The intervenors were disappointed in the amount of supplementary funding awarded and threatened not to appear further, leaving the Joint Board without the benefit of input from the intervenors during the second year of the hearing. Consequently, the Board issued a further supplementary decision based on further information submitted by the intervenors. Although the Board stated it did not depart from the principles enumerated in the original supplementary funding it conceded to the intervenors requests and, awarded funding. This illustrates the problem of controlling costs.

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127. See also D. Poch, footnote 16, supra.

128. R. Horwood, PIAC, footnote 29, supra, 93 Reco #7 and 97, Reco #17

129. OEB, footnote 25, supra, 28.

100. Susan McWilliams, footnote 4, supra, 34-37.

131. H. Fletcher and J. Gardiner, MOLCA, footnote 113, supra.

132. David Poch, footnote 16, supra and see also R. Horwood, PIAC, footnote 29, supra, 92, Reco #5.

133. OEB, footnote 25, supra, 22-25.

134. Susan McWilliams, footnote 4, supra, 22-24.

It should be noted that the IFP Act contains a number of provisions to control costs. Section 7(2)(g) requires that the intervenor have a clear proposal of a work plan for its use of funds. Subsection (h) requires that the intervenor have appropriate financial controls to be eligible for a funding award. The OEB has adopted a procedure of requiring the funds to be placed into the intervenor's solicitor's trust account or a separate bank account. Section 4(4) provides that the funding panel may award funding subject to conditions. That is, it may require at the end of the hearing that the intervenor account to the Board for all funds received in order for the Board to assess the reasonableness of the expenditures. For example, the panel in E.B.L.O. 234 in awarding Middlesex-Oxford Landowners Committee Association $208,400 said,

> It is the panel's opinion that, when taken together; the creation of a separate bank account to hold awarded funds; the appointment of a public accounting firm to set up appropriate accounting records; the requirement that cheques issued in respect of expenses covered by the award bear the signatures of both the Chairman and the Secretary-Treasurer of MOLCA; and the provision of a full accounting of the costs, incurred and funds disbursed verified by the public accounting firm, constitute sufficient control to ensure that any funds are applied exclusively to the purposes intended by the award.

Section 9(2) provides that the directors and officers upon the order of the Board shall be jointly and severally liable to repay to the proponent the amount of their award or such part thereof, if the intervenor fails without reasonable cause to comply with the conditions of an award.

The OEB requires the funds to be paid directly by the proponent to the intervenor. At the end of the hearing, the Board determines whether an intervenor is entitled to a cost

> award and the percentage of costs to be paid by the proponent. When the accounting of the funding and the incurred costs are submitted by the intervenors to the OEB, the task remains to assess the costs in the extended meaning of the word. This largely involves the necessity of an assessment by a taxing officer as is done in the courts.
>
> The Environmental Assessment Board has experienced considerable problems in controlling the expenditure of intervenor funding. This in part is due to the fact that they are dealing with larger amounts of money to finance interventions in hearings that exceed a year. In contrast to the OEB, the procedure of the [EAB] requires the intervenor to submit invoices for every expenditure for approval before the proponent can pay the funds. The volume of this exercise became quite burdensome to the Board's staff to the point that they turned this chore over to the Ministry of the Environment, Financial and Capital Management Branch, who seem content to take it on. However qualified that department may be to check accounts generally to determine whether they are authorized by the funding award, the audit staff are providing merely a clerical function and are not... qualified or empowered to make value judgements as to whether the costs were necessary or reasonable for the intervenor's intervention in the proceeding. It remains for the EAB at the end of the hearing to hold a costs hearing to determine entitlement to costs and the amount thereof. It may be that the services performed and amount detailed in the invoices approved by the Financial and Capital Management Branch to be authorized by the funding award are found not to be reasonable or necessary by the hearing panel in its costs award. Serious concerns have been raised that the Board not be imposed with the impossible task of monitoring the funding budgets of the intervenors and that the intervenors be made accountable and responsible for their budgets.

135. H. Campbell, CEDF, footnote 78, supra, 127, Reco 5.

136. Nancy Kleer, footnote, 78, supra.

137. George Davies, footnote 8, supra.

138. Eunice Skinner, Ontario Hydro, see footnote 21, supra.

139. OEB, footnote 25, supra, 26-27

140. Mary Munro, EAB, footnote 24, supra, 13-14.

141. P. Pinnington, ONGA, footnote 19, supra, 22-25.

142. OEB, footnote 25, supra, 12.

143. *Ibid.*, attaching memo R. Macaulay, Chair to Hon. I. Scott, 17 February, 1987, 5.

144. Judy Skidmore, Executive Vice President, Northern Community Advocates for Resource Equity, (NORTHCARE), November 20, 1991; T.S. Jones, footnote 2, *supra*; Rev. K. Logie, Stewardship Advocacy Coalition of Ontario, footnote 95, *supra*; L. Huinink, footnote 69, *supra*, 111, Reco #5 & #6; H. Fletcher and J. Gardiner, MOLCA, footnote 113, *supra*.

145. Heather Campbell, CEDF, footnote 78, *supra*, 125-126, Reco #7-11.

146. Eunice Skinner, Ontario Hydro, see footnote 21, *supra*.

147. J. Huzar, (CAC(Ont)), footnote 28, *supra*.

148. See footnote 17, *supra*, p.1.

149. *Ibid*

150. *Ibid*

151. Prof. Ron Pushchak, footnote 14, *supra;* K. Clune, CAN, footnote 13, *supra*; R. Bertell, International Institute of Concern for Public Health, December 6, 1991; M. Campbell, Beard, Winter, footnote 82, *supra*; D.Poch, footnote 16, *supra*.

152. Judy Skidmore, NORTHCARE, footnote 2, *supra*.

153. David McRobert, footnote 88, *supra*.

154. H. Campbell, CEDF, footnote 78, *supra*, 127 Reco#16.

155. Letter of Ovide Mercredi, Assembly of First Nations, 7 January 1992.

156. Professor Ron Pushchak, footnote 14, *supra*; P. Pinnington, ONGA, footnote 19, *supra*, 31.

157. H. Campbell, CEDF, footnote 78, *supra*, 124 Reco #1 and #2; D. Poch, footnote 16, *supra*; D. McRobert, footnote 88, *supra*.

158. Heather Campbell, footnote 20, *supra.*

159. D. Poch, footnote 16, *supra*.

160. Letter of J. Jackson, January 7, 1991. See also H. Campbell, CEDF, footnote 78, *supra* 63-66, detailing similar complaints of Greensville Against Serious Pollution (G.A.S.P.) in the Steetley Quarry case before the EAB.

161. PIAC, footnote 29, *supra*.

162. Mary Munro, footnote 24, _supra_, 10-11.

163. Eunice Skinner, see footnote 21, _supra_.

164. OEB, footnote 25, _supra_, 27:

> Recommendation 15:
>
> Appeals of funding decisions should not cause a stay in the proceedings because of the danger of retroactive rate making.

165. P. Pinnington, ONGA, footnote 19, _supra_, 34:

166. D. Poch, footnote 16, _supra_.

167. _Ibid_.

168. Eunice Skinner, see footnote 21, _supra_.

169. _Ibid_.

170. See J. Huzar, CAC(Ont), footnote 28, _supra_, attaching letter of K. Rosenberg.

# ACCESS AND IMPACT

## PART 3: CONCLUSIONS & RECOMMENDATIONS

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## VII. GENERAL RECOMMENDATIONS

### A. General Considerations: Affirming the IFPA

The central task of this assessment was to gauge the effectiveness of the IFPA in meeting its objectives. This is by no means a straightforward task. In this regard we would quote from the Canadian Environmental Law Association's submission to us. While making clear that he believes that decision-making has been enhanced by intervenor funding, Richard Lindgren allows that:

> Given the relatively short history of IFPA, it is somewhat difficult to document or quantify the causal relationship between the availability of intervenor funding under the IFPA and the quality of decision-making. In addition the determination of what constitutes a "good" decision is highly subjective and value laden.

Because the process of arriving at conclusions is value-laden, we acknowledge that both of us come from a background with a strong commitment to access for those who do not have it, to social justice in the law. But we also believe that when charged with a task one must carefully examine the evidence and be mindful that, sometimes, good ideas can go bad in application. In any event, the evidence on which conclusions are based should be presented fully and with balance so that both the recommendations and the foundations for them can be scrutinized.

In section VI, (Analysis of the Submissions) we tried, at some length, to convey the range of arguments and conclusions in the submissions. Our judgment is that there is overwhelming support for the concept of intervenor funding. Even more to the point, there is very strong support for the IFPA itself. However, there is substantial disagreement about some important details.

The file analysis reveals that (excluding the Ontario Hydro:DSP) the funding awards are about $50,000, taking about a half day to a day and a half to hear (this may be shortened or even eliminated, in some instances, if one of our recommendations below is accepted). From the information available to us the amount of the awards do not seem inordinate and they have been used appropriately, at least, in the sense that (with few exceptions) funded intervenors have been awarded costs without controversy.

We could be more confident about the appropriateness of the amounts awarded in intervenor funding if we knew what proponents were spending, a specific matter dealt with below. In any event, no concrete evidence was presented (albeit over only three years) that these actual awards have unduly burdened proponents, inflated rates, or otherwise distorted the regulatory process. For example, ONGA (Ontario Natural Gas Association) whose members appear regularly before the OEB and who, therefore, have been required to supply intervenor funding in several instances, reports in its submission that 11% of its intervenor costs awards go to IFPA funded intervenors with 15% to other intervenors and 75% to OEB staff (see section VIII.J.). But one might observe that only 11% is consumed by IFPA intervenors and some of those costs (or the costs attributable to the staff, or both) might shrink if there were better coordination between staff and other intervenors, an issue dealt with later. By contrast, while proponents and others express reservations about the extent of a positive impact, the Boards and intervenors are confident that their role has led to a broadening of ideas and arguments and has increased acceptance of these administrative decisions so that any costs are outweighed by attendant benefits.

Having drawn these conclusions, three considerations have guided the recommendations that follow.

The first is that funding must provide effective access to those who would otherwise be unable to participate, or to participate only in very abbreviated ways, to processes and decisions which have an impact on their lives. However, as the processes are opened up and interests are brought in, participation must be responsible. Additionally, there will inevitably be limits imposed by costs and time. Making participation both effective and, yet, constrained cannot be an abstract exercise. Rather it should be a comparative one, with the most relevant comparison being with the proponent's costs in the particular case and those of other intervenors and proponents in similar cases.

The second consideration focuses on intervenor funding as part of the larger decision-making processes before the respective Boards. There may be justifiable concerns about the length of time and the cost of some of these decision making processes, with the immediate focus on the environmental assessments in hearings such as Timber Management, OWMC and Ontario Hydro DSP. It is not part of our assignment to reach any conclusion about these concerns. What is relevant is the need to ensure that as any necessary reforms to these processes take place, intervenors and their funding should not become ready targets. The issues surrounding these hearings go far beyond the role of intervenors. Eliminating intervenor participation would not solve these problems, but it could beggar the process. What needs to be preserved throughout is a commitment to intervention that is both effective and responsible.

The third consideration which has guided us is to see the Intervenor Funding Project Act as a pilot project that, through refinement, can become a model for access in other contexts. How and when such migration should take place is not part of our assignment. But we do suggest that being bold in creation while careful in application can ensure that a program not only serves its immediate purpose but becomes a signpost for effective and accountable change in other areas regarding access as need and political will to effect change become established.

## B. The Recommended Model

Three models other than the one existing under the IFPA were suggested to us and were discussed earlier (sec. IV.C.i). They were, first, funding based exclusively on a costs regime; second, the establishing of a public interest branch of legal aid to represent intervenors; and, third, intervenor funding paid by some public fund rather than by the proponent.

Regarding the first suggestion, we are not aware of support for it other than the submission to us of Energy Probe. (However, there does seem to be some affinity, in effect, between Energy Probe's proposal and the overarching goal in the OEB's recommendation. We will come to the OEB momentarily.) Although Energy Probe's proposal has some attractive goals, e.g. reinforcing the concept that intervenors, not lawyers and experts should retain control of the intervention, it appears simultaneously to go too far and not far enough. Too far because all interventions would be paid for so long as they were "responsible." Not far enough because the very real barriers to initial entry into the process are seen to be almost exclusively a matter for agreement between lawyers and consultants and would-be intervenors. That professionals could bear some initial risk of financing participation and as a method to ensure scrutiny of the quality of intervention is an arguable proposition which we will accept to some limited extent, later in the recommendations. However, Energy Probe's proposal, in our judgment, goes too far in that direction and this conclusion is strongly supported by other submissions.

The second suggestion - establishing a public interest branch of legal aid to represent the intervenors - was raised in two submissions, the Public Interest Advocacy Centre and the Consumers' Association of Canada (Ontario), only to be discounted. The model was rejected mainly because intervenor funding leaves more control with the particular intervenor and because it leaves financial responsibility with those most directly involved with the proposed project being scrutinized, the proponent. Moreover there are well known pressures on the legal aid system and the Report of the Law Society of Upper Canada (discussed in section iv 2(c)(i)) has resulted in the decision that the Ontario Legal Aid Plan will cease funding certificates in environmental matters. These considerations lead us to conclude that this possibility is not a viable alternative.

The third - intervenor funding paid by some public fund rather than by the proponent - is the variation that garnered the most support. As discussed earlier, the two reasons for this suggestion are that it would make application of the process to "private" proponents more palatable since they would not bear the full costs of such public participation and that it would make funding possible where the proponent (whether public or private) could not afford (however judged) the costs of such participation.

We acknowledge that this variant is somewhat persuasive but we, nevertheless, do not recommend it. We believe that more effective monitoring of the costs and benefits of the process will be achieved if those who are the focus of these decisions - the proponents - are made to bear the costs. It is they who are the centrepiece of the regulated activity. A critical aspect of that role requires effective participation by other interests while ensuring that that participation is responsible. On balance, such financial responsibilities should not be transferred to the general purse with the ensuing dulling of that monitoring function.

The possible inability of private sector proponents to afford intervenor funding in some instances must be acknowledged. However, such inability should be demonstrated on a case by case basis. There exists at present, subsection 8(3) of IFPA which allows the panel to refuse to make the award or reduce it in the face of "significant financial hardship" and we recommend that section be retained since it responds to the expressed concerns.

The foregoing leads to our recommendation that intervenor funding be paid for by the proponent. There remain many details concerning criteria, the decision maker, quantum etc. But before coming to these important specifics it is necessary to discuss two general but very different reservations we have about the OEB, JB and EAB and their approaches to implementation of intervenor funding. These reservations and our reactions to them have influenced the remaining recommendations.

## C. Reservations Concerning the Boards

In the case of the EAB and JB reservations, elaborated upon in a moment, arise because of the Ontario Hydro DSP and issues about environmental assessment generally. Regarding the OEB we have strong doubts about its proposal for dealing with the relationship between costs and intervenor funding.

i) The EAB and the OH:DSP

We are unable to express a confident opinion about the role of intervenor funding in the Ontario Hydro:DSP hearing (see section V.B.). The huge amounts awarded for intervenor funding compared with all other cases ($23 million, average: $680,000) coupled with the fact that the main hearing is still in its early stages and it is not clear when it will be completed make drawing conclusions very difficult. Additionally, there are two other hearings before the EAB and Joint Board - the Timber Management and OWMC - that have also been very complex, lengthy, costly, and have not yet concluded. These other two hearings have not been funded under IFPA (except for supplementary funding for OWMC) but they raise similar issues regarding intervenor funding and the environmental assessment process.

When these hearings conclude, we assume that issues and questions surrounding them will be assessed. We anticipate this will be done from a number of perspectives: obviously the role of the proponent, but also including the role of intervenors and their funding. The central questions will be how much money was awarded, how was it spent, and the effectiveness of the interventions. It will be important to consider that the ultimate conclusion be that intervenors have an important role in such proceedings but the proceedings themselves may need to be reformed. Yet, as the proceedings may be modified so, too, may the role of intervenors be altered. There should be openess to such reform so long as there is a continuing commitment to intervention that is both effective and responsible.

Further, as mentioned earlier, there are a number of initiatives developing which may have implications for intervention in environmental processes, particularly complex cases. These include the proposed Environmental Bill of Rights, the Commission on Planning and Development Reform in Ontario (New Planning for Ontario), developments under the federal EA legislation, specifically, possible co-ordination between the EAB and federal review panels. More immediately there may be substantial changes to the EA process discussed earlier (I.D.). Increased demands for participation in Environmental decision-making arising from these initiatives may put pressure on IFPA to respond by expanding funding. Until these new processes are in place, however, it is difficult to know whether the existing IFPA can respond.

All of this leads us to conclude that, while IFPA should be made permanent, another assessment should take place in another three years. We will elaborate below after we deal with other reservations concerning the OEB. However, before leaving this aspect we would like to be clear that our reservations about the OH:DSP do not extend to the funding panel itself. Quite the contrary. So far as we are able to judge, Mary Munro, the Executive Vice-Chair of the Environmental Assessment Board, in conducting these proceedings displayed remarkable imagination and fortitude in dealing with a challenging situation for which there was otherwise little precedent or guidance.

### ii) The OEB and its Recommendation Concerning the Relationship Between Costs and Intervenor Funding

The OEB's complete recommendations appear in Appendix G. In addition, they are discussed in various places in section VI.E., particularly vi and vii. The thrust of its submission is to align costs awards with intervenor funding awards. Both costs and intervenor funding require the common characteristic that the participation must be relevant and contribute to the process. However, with costs financial need has been treated as essentially irrelevant while intervenor funding is heavily determined by such need. This difference is seen as disjunctive by the OEB, and its goal is "to align the principles of funding awards with those of cost awards" It indicates in its submission, received in the week we were to report, that it is undertaking a review of costs and "the results should be available shortly." Unfortunately, our constraints are such that we must come to conclusions based on the OEB's submission and the other information we have gathered during our study.

The OEB would accomplish its goals through its Recommendations which contain a preamble stating that eligibility of a party to intervene should be "determined by its anticipated contribution to the process and not by its ability to access its own funds." This recommendation would then be buttressed by recommendation 2 collapsing the private/public distinction, by recommendation 8 removing the financial resources standard (section 7(2)(c)), by recommendation 9 removing the fundraising requirement (section 7(2)(d)), and by recommendation 13 removing the legal aid rate restriction on lawyer's fees (section 7(3)(a)). However, provision is made for a negative costs award (recommendation 12(1)) and for a holdback of 20 to 30 percent on every funding award (recommendation 12(2)).

We are strongly opposed to these recommendations for three reasons. But before stating these we would observe that the OEB would eliminate the difference between costs awards and IF by focusing on intervenor funding. But if a difference between costs and intervenor funding itself is objectionable it is not clear to us why the other alternative should not be considered: costs brought into conformity with intervenor funding, thereby using need as a determinant throughout. It is not clear to us that difference by itself is objectionable and may, on the contrary, be desirable. In any event, when difference is itself to be ended, we would suggest that all ways available to accomplish that goal ought to be reasonably explored. We make these observations not to enter the larger terrain of costs and administrative boards which is not at the core of our assignment but to underscore our puzzlement at the assumption that intervenor funding and costs must proceed on the same basis and that need ought, therefore, to be eliminated.

Our three reasons for opposing the OEB's changes are: first, administrative burden; second, burden to the proponent; and third, the desirable policy and practical effect of requiring those involved in these administrative processes to focus on need.

Regarding administrative burden on the OEB, our search revealed that during the applicable period (i.e. up to 15 Dec 1991) before the OEB there were 39 intervenors who applied for funding but there were 240 intervenors during that same time. We cannot say with any precision how many of the 200 intervenors who did not apply would have applied had the recommendations of the OEB been in effect but we believe it is reasonable to suppose that a significant proportion would have. If the numbers involved were just twenty percent (40), then the applications for funding would have doubled. Nor does it appear that such effects would be offset by savings regarding costs proceedings since these would have to be held for several reasons: to assess an amount based on what had actually occurred, to determine how the proposed hold back should be disposed of and, possibly, to deal with negative awards.

The second reason, financial burden on the proponent, is also related to the number of additional applications for intervenor funding - without need - that the OEB's recommendations will trigger. It may be argued that the proponent under the OEB's costs structure will have to pay such awards, in any event, so there is really no additional financial burden imposed. But even assuming that is true (we have no idea what proponents might say about any additional financial burden to them in the early timing of payment) there would certainly be some burden to them in having to go through two sets of hearings for the increased number of intervenors who would now come forward under the IFPA and who would then also apply for costs at the end of the hearing.

Even if the two reservations just expressed could be demonstrated to be groundless, we would still oppose the recommendation for a third reason: the desirable policy and practical effects of requiring those involved in these administrative processes to focus on need. As we understand from such documents as the discussion in the Legislature at the time of the introduction of IFPA (see I.B.) and the memorandum of the former Chair of the OEB, R. Macaulay to the then Attorney General (attached to OEB submission and quoted in sec VI.E. (xiv)), the goal of intervenor funding is to focus on those who have had no or abbreviated access to the process particularly because of lack of financial resources, in order to provide them the support to be effective. To accomplish that goal with all its difficulties, it is vital that the focus on financial need be maintained. This is not easily done and there is room for disagreement about how the balance should be struck, but in our view the OEB's proposal runs the very serious risk of abandoning the exercise. In the name of conformity with costs, the very real need to focus on access will be blunted.

Finally, it is our judgement based on the review of the applicable files, the relevant submissions and the Board's decisions themselves, that the OEB has done a very sound job of applying the criteria and displayed a general willingness to participate in the pilot project. There are reasonable differences about some important details of these decisions. But there is nothing in the existing record, in our view, to suggest that to date the Board has been incapable or, indeed, unwilling to grapple with the important issues generated by the existing criteria.

Nevertheless, we recognize that there is a real difference of viewpoint here. As a result, and as indicated earlier, we propose another assessment in another three years. If our recommendations are accepted the OEB will have an opportunity to demonstrate that it cannot work with the model and that the uniformity between costs and intervenor funding is paramount. If the OEB's recommendations are accepted, then our worries about the blunting of access can be tested against three years of actual experience.

## D. General Recommendations Regarding the IFPA being Made Permanent

In this section we discuss two options for dealing with the fact that Part I of the IFPA, as a pilot project, is to be repealed unless some counter action is taken.

The first option - which is preferable - is to pass legislation making IFPA permanent. That legislation would also reflect the specific recommendations we make - to the extent they are found acceptable. However, we also recommend that the new Act should contain an express provision requiring an intensive review at the end of another three years.

In the subsection just above, we indicated two very separate reasons, regarding the EAB/JB and the OEB, for recommending another review. In addition, in the case of the EAB/JB, they have made very few costs orders related to intervenor funding. In another three years, the relationship between costs and intervenor funding for those Boards could be more fully examined. With regard to all three Boards there have been too few instances of supplementary funding to be assured of how the provisions are being utilized. We do make some recommendations in that regard but they could be bolstered by more experience. Finally, we make a number of recommendations below that deal with specific but important issues. However these issues are resolved in the legislation, they are more likely to find at least tentative acceptance if they themselves are seen as open to being revisited. All this may be of enhanced importance if the goal of the legislation is to develop a model for access that can be used in other areas.

The other option - simpler but not preferred - is just to extend the existing legislation for another three years. In this case our recommendations could be reassessed after another three years and in light of the additional experience and other developments.

However, we believe the concept of intervenor funding in this context should receive legislative affirmation now and that there are issues that ought to be attended to at this stage (and there is certainly pressure to do so in the submissions) so long as there will be provision for another detailed review in three years. The remainder of the recommendations assume that option one will be accepted.

## E. Expansion to Other Tribunals

We were not asked to make recommendations concerning expansion of intervenor funding to other contexts and so we recognize the limits of what we are about to say. Nevertheless, as discussed in section VI.C.(ii), we received a number of submissions concerning the Ontario Municipal Board and the Environmental Appeal Board and we believe there is some utility in providing our opinion on these submissions.

One submission suggested that there was "no logical reason why the Act should not apply to any administrative tribunal dealing with public interest issues." One can imagine a number of instances where, indeed, such a device could be used to afford access. Clearly, such a discussion at so general a level is not for us to comment upon but we would observe that a likely consequence of the affirming of this project will be an elevation of expectation concerning its application to other areas. Furthermore, one of the goals of this pilot project was to provide a basis to determine whether the concept of intervenor funding could be expanded to include other tribunals (I.B.) From a perspective favouring access, these expectations are good but policy makers and legislators will be faced with some challenging decisions regarding application to other areas.

A few submissions suggested allowing the extension of the IFPA to other contexts on an ad-hoc basis in "special circumstances" or after "the meeting of some threshold test". We are opposed to this. The open-endedness and the attendant time consumed by responding to such arguments make this suggestion decidedly unattractive. There may be a day when intervenor funding should apply to pay equity or labour relations or workers' compensation or, indeed, the Ontario Municipal Board or the Environmental Appeal Board (more fully discussed in a moment) but this ought to be done by an affirmative act of policy makers and legislators after careful consultation and not by individual decision makers whose mandate is focused on very different issues.

On the other hand, the submissions did raise, specifically, application of intervenor funding to the OMB and the Environmental Appeal Board. Almost all either affirmatively suggested extension or at least were not opposed to it in principle. The OMB already has cases where there is intervenor funding in respect of its Joint Board jurisdiction. The Environmental Appeal Board, as the Report Regarding Environmental Cases to the Legal Aid Committee by the Group Applications and Test Cases Sub-Committee (VI.C.ii) pointed out, now hears many cases, particularly those dealing with abatement orders, which are of significant public interest and in which groups that represent the public interest are named parties. However, as a result of that Report, legal aid certificates will no longer be available for intervenors in those proceedings.

Nevertheless, there are issues that need to be carefully explored. For example, in the case of the OMB, its past practice in not awarding costs to intervenors and the fact that there are a large range of proponents before the OMB would have to be carefully examined. These are issues, among others, that Chair J. Kruger has raised in correspondence made available to us (see VI.C.ii.). In grappling with them note should be taken of the fact that IFPA already contains provisions that limit funding to issues affecting the public interest (s.7(1)(6)), that affect a significant segment of the public (s.7(1)(a)) and that relieve against funding for a proponent who would suffer financial hardship (s.8(3)). Then, too, there may be significant changes to the OMB itself arising from the recommendations of the (ongoing) Commission on Planning and Development Reform in Ontario (New Planning for Ontario). For the Environmental Appeal Board mention was made of the possible chill to appealing the Director's Order if to do so is to be faced with an order for intervenor funding. It is of concern to us that we received no submission from the Environmental Appeal Board exploring these issues.

There is a basis for expanded application of IFPA so long as it is recognized that the goal of access must be evaluated against any undue burden it could impose. Much more careful consultation has to be carried out with those interests that are directly implicated before the details of the model we are recommending - or any model - is adopted.

What we do recommend is that this consultation be carried out and some decisions be made, at the latest, by the next review of IFPA. In the case of the OMB we are advised by the Commission on Planning and Development Reform in Ontario that it will be making recommendations concerning intervenor funding. In the case of the Environmental Appeal Board, we would hope that the Board and the Ministry of the Environment will proceed to consult and arrive at a decision, again, at the latest, by the time of the next review of intervenor funding.

## VIII. RECOMMENDATIONS ON SPECIFIC ISSUES

The following are our specific recommendations which assume: (i) affirmation or extension of the IFPA; (ii) payment by the proponent; and (iii) continued application to the EAB, JB, and OEB.

### A. Decision Maker

There are three options available regarding who should decide funding applications: the main hearing; a funding panel drawn from the Boards members; or some form of separate agency.

Before discussing these options there is one issue concerning decision makers that both Boards raised. This is the ability of the Chair to appoint more than one person to the panel to hear applications. Though having more than one person hear application will obviously be an additional burden on the resources of Board members it seems uncontroversial that the option should be available. We recommend that the Chair of the decision making authority (whatever it is) be authorized to appoint as many members as he/she judges necessary to hear funding issues.

As to the decision maker, though both Boards (albeit as a second choice for the EAB) recommended that the Main Panel hear these application, we are opposed. The appearance of bias and the curbing of candour on the part of the decision maker, intervenors, and proponents who must separate out their views on the funding applications from their views on the substantive issues ground our opposition. We appreciate there are advantages including coordinating of substantive issues with funding issues but we believe they do not outweigh the disadvantages.

We are very attracted to the EAB's recommendation that an independent intervenor funding agency be established "to decide on both initial and supplementary intervenor funding application and to administer all intervenor funding programs." This proposal would be more attractive if it were clear that the decision makers would be drawn from all constituencies involved in the process - Boards' members, intervenors (e.g.northern communities, aboriginals, public interest groups) and proponents - on some kind of rotating basis. An independent panel that is reflective of the interests involved will not only address the concerns about bias in supplementary funding but will make funding decisions more sensitive to the interests of those who expressed the concern that they are being excluded from the process (VI.B.(ii) and E.(xvi)). In addition, an independent panel will be in place and available if other tribunals are added to the IF regime, minimizing the administrative burden on those tribunals.

However, the EAB gave no indication of the cost of this agency nor how it would be funded. The constraints under which we are operating made it impossible for us to undertake any study of these issues; the more so because we received the EAB's submissions in the week we were to report. We are very sympathetic to this proposal both in terms of decision making and the ensuing coordination and expertise, and in terms of responsible and timely administration and monitoring of awards. However, our recommendation regarding the establishment of an independent intervenor funding agency is conditional upon those receiving our Report satisfying themselves concerning costs and means of funding of this agency.

In contrast, costs decisions should continue to be dependent on an assessment of a party's overall performance in a hearing and, therefore, should continue to be a matter for the main hearing.

## B. Procedures for Decision-Making

Both Boards made the recommendation that it be clear that an oral hearing is not mandatory but, rather, it should be available when circumstances warrant. (sec. VI.E.(ii).)

Oral hearings can be a critical aspect of decision making particularly when issues of credibility are at stake and particular witnesses and their demeanour ought to be observed. But it is a truism to say that such hearings can be a long and involved process and, therefore, an expensive one. In many instances issues regarding who is the proponent, who is qualified to receive funding and the amount of that funding could be decided on the basis of detailed written submissions, perhaps in the form of affidavits to bring home the duty of complete and accurate disclosure on all sides. Indeed, a rule might be formulated that only for good cause shown (generally speaking, submissions on that issue could also be in writing) would there be an oral hearing which would essentially involve cross examination on these written statements. But the appropriateness of that detail we will leave to the decision makers themselves.

From this perspective we reject any suggestion that the Statutory Powers Procedure Act apply to funding decisions. The consequence of such application would be that oral hearings would be virtually inevitable. Rather, if the IFPA is amended, it should contain a provision expressly stating that the Statutory Powers Procedure Act does not apply to funding proceedings.

We recommend that an amended Intervenor Funding Act provide that the Statutory Powers Procedure Act does not apply and that an oral hearing is not mandatory for every intervenor funding decision or for decisions regarding applications for supplementary funding.

## C. Naming of Proponent

For reasons reproduced earlier (sec VI.E.iii.) the OEB wishes to have the definition of proponent expanded to permit the board to name utilities as proponents in the event that the Board calls a generic hearing on its own motion. This recommendation would appear to reflect existing practice and be within the spirit of the existing IFPA. Accordingly, we recommend expansion of the definition in that way.

## D. Early Funding

At present, the IFPA comes into play only at the time a hearing is convened, and funding is used only for hearing-related expenses. Under the Environmental Assessment process, this timing can operate as a bar to effective participation in the pre-hearing phases.

Under the existing EA process, "pre-submission consultation" with interested groups and neighbours of a proposed undertaking is not required by the Act but is very strongly encouraged by the Ministry of the Environment. The scope of this consultation varies from proponent to proponent, but can include the provision of technical documents for review and participation in meetings and perhaps mediation. If the recommendations of the EA Task Force discussed in the Introduction (I.D.) are adopted, this phase will grow in importance, as will the demands on members of the affected public to responsibly participate.

Some proponents have recognized the importance of the pre-hearing phase and the need for effective early public participation. The recent initiative of the Essex-Windsor Waste Management Committee, as discussed in section (VI.E.(iv)), illustrates this important gap. Such efforts respond to a need with complex issues to not wait until the hearing to bring the public in; if they are brought in, they should be given the ability to participate effectively. The EAB itself made a recommendation in this regard (VI.E.(iv)). In addition, Bill 143, an act respecting Management of Waste in the Greater Toronto Area and to amend the Environmental Protection Act, contains provision for participant funding to apply "in any part of the environment assessment process to which [IFPA] does not apply." We agree that the principles that support IF at hearings apply equally to IF in the pre-hearing phase.

We therefore recommend that the IFPA be amended to apply, where relevant, to the pre-hearing phases of a process. This is particularly relevant to the EAA and will, therefore, be subject to the amendments to the Act arising from the EA Task Force report. The model should be the same as that for hearing-phase IF, that is, the proponent should be required to pay and the decisions on eligibility and amount of award should be made by the funding panel. In addition, the amount of pre-hearing funding should be taken into account in any funding award at the hearing, if any. However, because this issue is being addressed as part of the EA reform process, it may be that details of the funding process will need to be refined when those reforms are finalized.

One of the motivations for pre-hearing consultation and funding to assist that consultation is to resolve issues outside the adversarial framework of the hearing and to respond to criticisms in that regard (VI.B.(ii)). If it works well, it should reduce the overall costs by scoping the issues for any hearing to only those that cannot be resolved by the participants themselves. The risk, however, is that pre-hearing consultation becomes simply one more phase added to the existing process without overall savings in time and costs. For this reason, there should be monitoring of the provision of pre-hearing funding so that its goals are in fact met. At least part of this monitoring could be carried out as part of the recommended reassessment of the IFPA.

We appreciate that the thrust of the recommendation applies to procedures related to the EAB and Joint Board. However they are to apply "where relevant" so that the OEB can decide the circumstances, if any, when they should be invoked before that Board.

## E. Relationship Between Funding Panel and Main Hearing Panel

One of the important differences between the OEB and EAB/JB under IFPA is with respect to their interpretation of s. 3(4), which prevents a board from proceeding with a hearing until the funding issues are resolved. The OEB determines the relevant issues for the hearing before the funding panel sits to determine funding eligibility and amounts. In the approach followed by EAB Panels, it is the Funding Panel which makes a preliminary determination of the relevance of issues and makes the funding award on the basis of that determination. This is not a problem in many cases but can be in complex and highly technical cases, particularly those under EAA, such as the Timber Management Class EA and the Ontario Hydro DSP, where the breadth of the possible alternatives which the proponent should reasonably have considered will not necessarily be clear. Another difficulty with complex and lengthy hearings is that many disbursements will depend on the way the hearing will be run, for example, if the location will affect travel costs and the need for temporary office space if out of town. The Funding Panel is forced to estimate costs without knowing the full extent of each intervenor's requirements.

The fact that the EAB does not consider itself to have this authority has created great frustration for certain funding panels trying to determine what issues deserve funding. This frustration was described in the decision of the DSP Funding Panel; it prompted the EAB to recommend an amendment to IFPA to clarify that boards may make rulings on jurisdictional and procedural issues and may determine the issues of relevance prior to the determination of funding questions.

It seems clear that the hearing panel is in the best position to determine the scope of the hearing and the relevant issues and numerous aspects of conduct of the hearing, such as location. It is appropriate that these decisions be made prior to the funding panel's evaluation of the funding applications. We, therefore, recommend that the IFPA be amended to clarify the ability of the hearing panel to make such decisions prior to the determination of the funding applications.

However, it must be recognized that for intervenors to participate in such determinations requires preparation by their counsel and consultants, if any, and staff. Because it will not generally be possible for intervenors to reopen the issues list at a later point, well-prepared participation in the initial scoping sessions is necessary for effective overall participation in the hearing. For this reason, we recommend that the IFPA be amended to allow the funding panel to determine entitlement to funding and make awards to intervenors to participate in the scoping and issue identification phase of the hearing before the main hearing panel. (There are other recommendations about staging under N, Special Rules For Complex Hearings, below) Thereafter, once the relevant issues have been determined, intervenors would return to the funding panel for the evaluation of applications for funding for participation in the main hearing.

### F. Criteria for Funding

The present criteria for funding, found in s. 7(1) and 7(2) of the IFPA, are an attempt to balance the interests of proponents and intervenors and to set rational limits on who should be funded. The criteria reflect several limits on who can be funded: for example, "public interest" issues must be raised; there must be a need for the funding; the intervenor must be accountable and a responsible representative of its interest; and duplication is to be avoided.

Generally, these criteria have worked well to ensure that those intended to benefit from the IFPA have indeed been the ones funded. We recommend that, subject to the considerations below, the criteria in s. 7(1) and 7(2) of the IFPA be retained.

For reasons we articulated earlier we oppose the OEB's attempt to obliterate the criteria which focus on need. Here we would make a few comments about its desire to eliminate the "public" requirement in ss 7(1)(a) and (b). We acknowledge the difficulty of crisp distinctions between private and public interests. But in this context that distinction is clearly linked to the larger purpose of focusing on need. Our judgment of the decisions is that both Boards, on this point, have leaned to err, if at all, on the side of funding.

We want to say clearly that our opposition is not based on any hostility to private interests. What we are adamant about is that these private interests demonstrate a need and a public aspect to their participation. In this regard the OEB as part of its reasons for rejecting the public/private distinction cites the example of "a property owner, over whose land a utility proposes to construct a pipeline, should be funded to represent his (sic) purely private interests in spite of the all-important public interest inherent in any pipeline."

With respect, we do not see how this sympathetic example advances the Board's position. We would agree that property owners of that description would have a strong case for funding, and the record reveals that similar interests have, in fact, been funded by the OEB. But that is not and should not be because they are property owners per se. Rather it is because they demonstrate need (particularly vis à vis the proponent) and they establish that the potential impact on them is part of the public interest determination.

Turning to section 7(2), some ambiguity is present which allows for different interpretations. It is thus important that several matters be clarified. First, although the IFPA provides that the s. 7(2) criteria are factors that funding panels shall "consider" in making its decision on eligibility, there is no indication as to which factors are most critical, without which eligibility should be denied, and which factors can be waived in appropriate circumstances. The DSP Funding Panel attempted to create such a hierarchy, but no consistent interpretation abides.

Second, there is no indication whether all of the criteria must be met in every case. Although both boards and the Ontario Court of Justice have addressed this issue, the IFPA would be improved by an amendment clarifying that not all of the criteria need be met for an intervenor to qualify for funding. We therefore recommend that s. 7(2) of the IFPA be amended to provide that all of the criteria should be considered by funding panels but that all of them need not be met in every case. Our judgment is that no further precision in that regard is required.

Third, the requirement that intervenors attempt to bring related interests together into an umbrella group (s. 7(2)(f)) has caused difficulties for intervenors in several cases, at both boards. While this is, in our view, a reasonable criterion in principle, its application can be somewhat heavy handed. Some panels could have shown more sensitivity to the different perspectives that intervenors raising related concerns can bring to bear on the presentation of evidence and argument in a hearing. Lacking such sensitivity some panels have, in effect, forced coalitions on reluctant participants. (see discussions in section VI.E.(vii) & (xvii)). This criterion is intended to encourage reasonable attempts to build coalitions of like interests. This avoids duplication and thereby helps limit costs and it can benefit intervenors through the pooling of resources -- both are laudable goals. However, the IFPA should be amended to make clear that, if a reasonable attempt to form a coalition fails, a coalition should not be forced. One way to minimize the risk of this happening is to encourage panels, as in the DSP decision and as suggested in the PIAC report, to use the concept of different "perspectives" on related issues in the application of this criterion (and ss. 7(2)(a) and (b)). We recommend that s. 7(2)(f) of IFPA be amended as follows:

> the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing. Where it appears to the panel that an intervenor might coordinate its plan of activities with that of another funded intervenor without losing the ability to represent its separate and distinct perspective fully and effectively, all such intervenors have the burden of showing why such a coordinated plan of participation should not be a condition of funding for any intervenors concerned.

On the other hand, there is an important distinction to be made between forcing coordination on the representatives of interests that should be separately represented and making hard decisions about allowing separate representation of the same interest. There can be situations where an interest is fully represented by one organization and a decision to fund others to represent the same interest would be unfair to other parties and wasteful of resources. The funding panel will be acting responsibly when it considers the criteria in the Act and makes a judgment about which intervenor will best represent that interest.

Fourth, the requirement that an intervenor have an "established record of concern" (s. 7(2)(e)) causes many persons to fear that it could be used to deny funding to groups which form to fight the particular proposal for which the hearing will be held. Despite this apprehension, this criterion has not in fact been applied in this way by the funding panels. Intervenor groups that are newly formed have been funded by both the EAB and OEB; where there is no history for a group, the panels have looked for other evidence of commitment to an interest such as the commitment of individuals in the new group to following an issue. In one OEB case, the funding panel even considered the formation of the new group as evidence of commitment to the interest. The intervenors who have been denied funding on this ground are those referred to by the DSP Funding Panel as "consultants without clients".

The essence of this criterion is that an intervenor should have a commitment to the interest it seeks to represent; the requirement of an "established record" is merely some evidence of that commitment. We therefore recommend that s. 7(2)(e) be retained.

Fifth, there has been some confusion and inconsistent application of the criteria of "ascertainable interest" and "separate and adequate representation." It is recommended (see above) that IFPA be amended to provide that these criteria be determined with reference to the different perspectives of the intervenors. Consistency in treatment with respect to contribution required and global amounts awarded has been raised as an issue. It is our view that the criteria together provide adequate tools for coming to terms with this issue. In particular the Boards need to carefully monitor funding decisions to ensure that consistency both within and between hearing occurs.

## G. Level of Funding

### i. General Level of Funding

One cannot properly judge the question of an appropriate level of funding in absolute terms. Rather, it can only be judged in relation to the scope of the task being undertaken. In determining the level of funding, Funding Panels now address themselves to the particular circumstances of the intervenor, to the issues being raised by the intervenor and to each intervenor's relationship to the overall participation of the other funded intervenors. Although intervenors are required to disclose financial information and their plan for participation in the hearing, Funding Panels do not appear to review and take into account either the cost of the proponent's participation in the hearing or the amount that the proposed undertaking is ultimately expected to cost. In fact, in one case, when the board was asked to do so, it refused to order the proponent to divulge its hearing costs on the grounds that such information was not relevant to the appropriate level of funding for the intervenors. We note that although the Issues Paper specifically invited comment on these questions, no proponent offered any response.

We conclude such information is very relevant to a determination of initial or supplementary funding. Intervenors seeking funding are required to divulge in great detail their financial circumstances and their plans for the conduct of the hearing. Without information about the proponent's proposed costs, it is difficult for a funding panel to accurately assess an appropriate level of funding. At present, it occurs to us that the question of the proponent's expenditures on the project and for the hearing itself might be tested, independent of the boards' disposition, under the _Freedom of Information and Protection of Privacy Act_ for those proponents subject to it. At a minimum it appears to us an untenable position that a proponent would refuse to disclose the cost of the project and its cost in a proceeding and then argue that an inference should be drawn that an intervenor's request for funding is excessive.

Possible qualifications on such disclosure might focus on the proponent establishing that to disclose this information would reveal trade secrets, harm its competitive position, etc. Such a test would be akin to s. 17 of the _Freedom of Information and Protection of Privacy Act_. Even then, such issues might be handled by an _in camera_ session with disclosure being made to the funding panel and, possibly, the counsel for the intervenors. We are not suggesting that this degree of procedural complexity need be reached. We are only suggesting how possible objections by proponents might be answered.

The EAB in its submission has taken up this issue ( which it characterized as "fundamental") and makes two alternative recommendations (sec VI.E.(ix) (a)), The second is the point we have just expressed. The first is to actually limit the funds available to public proponents for preparation of these cases.

The EAB does not specify whether it has such concerns for all cases or for just those that are particularly complex, lengthy and costly. It does indicate the difficulties of imposing a limit on funding (sec. VI.E.(ix)(a)). It is also not clear, as a matter of policy, why such a limit should only apply to public proponents. As an initial strategy we favour the first alternative of proportionality as a means of ensuring appropriate levels of funding for intervenors and because of the salutary effects public disclosure of the costs of this hearings will have on those monitoring these process. We assume the overall costs of these proceedings is an important considerations for those reviewing the procedures (sec. I.D.)

We recommend that the Intervenor Funding Act specify that in determining quantum of awards, whether initial funding or supplementary funding, the funds spent or to be spent and the total cost of the undertaking are relevant considerations to take into account; for that purpose appropriate full disclosure is to be made by proponents.

### ii. Legal Aid Rates

The requirement in s. 7(3)(a) of IFPA that legal fees be assessed at the Legal Aid rate was criticized even before IFPA was passed. The first funding panel for the OWMC hearing, under the Order in Council, recommended that this limit be abolished and replaced with a limit set at the level of remuneration for government rates to outside counsel. This sentiment was also expressed by the opposition parties during the debate on IFPA in the Legislature in 1988 and is found in several of the submissions. The essence of this view is that the Legal Aid rate limits the ability of intervenors to hire experienced counsel and creates a disadvantage for intervenors when compared with proponents who have the counsel of their choice.

Although a very strongly held view, the anticipated problems do not appear to have surfaced in practice to date. Many experienced and knowledgeable counsel have ably represented funded intervenors in hearings before all the boards to which IFPA applies. One of the reasons problems may not have surfaced is the fact that costs awards are available at the end of hearings. Costs awards are not limited in the same way as IF awards, so the difference between the Legal Aid rate and a lawyer's usual fees can be (and has been) made up in the costs award. Admittedly, this requires lawyers to bear some of the risk of an intervention up front, but this risk is relatively small and creates an incentive to conduct a quality intervention that will be rewarded with full fees at the end of the hearing. In the situation of very lengthy hearings where the time between initial funding and costs is one or more years, our recommendations under subsection N below, particularly as they relate to the need for interim costs awards, will relieve against any hardship created by the retention of the Legal Aid rate limit in IF awards. We therefore recommend that s. 7(3)(a) of IFPA be retained in its present form.

One submission suggested that a 30 - 50% premium be added to the Legal Aid rate, citing the provisions of the new Class Proceedings Act. This "parallel" should be viewed cautiously. That Act provides IF for certain disbursements, but does not fund legal fees. The "bump-up" in the Class Proceedings Act is a premium that will be awarded to a lawyer in a costs award at the end of the proceedings, if the action is successful and in recognition of the fact that the lawyer has assumed the risk of the proceedings throughout. We doubt that that model, taken as a whole, would be seen to be preferable.

The OEB rejects the Legal Aid rate limit. It does recommend a hold back of 20 to 30 percent to be made to every funding award (Rec. 12(2)). If our recommendation is rejected consideration should be given to this alternative.

## H. Eligible Disbursements

The definition of "eligible disbursements" in s. 7(5) of IFPA has been criticized as too narrow by the EAB, which asked the government to bring in a regulation to allow it more discretion. This view was echoed in a number of submissions. The IFPA definition is generally narrower than some funding regimes in other jurisdictions. It is also narrower than the allowable disbursements in the recent Order in Council for the Essex-Windsor Waste Management Committee pre-hearing provision of funding. We agree that the list of eligible disbursements in s. 7(5) does not always meet the legitimate needs of intervenors. One example is the need for funds for Native elders and interest group members to travel to confer with others to reach decisions or to form or maintain a coalition. Because travel costs of lawyers and consultants are eligible for funding, this constraint favours the participation of hired professional representatives over that of members of the intervening group.

The language of the section is restrictive but allows for new disbursements to be added by regulation, apparently in recognition of the possibility that the listed disbursements may prove inadequate to the needs of intervenors. The fact that the EAB's request for a regulation was never acted on points to the need for a change in the section. We therefore recommend that s. 7(5) be replaced with a provision giving funding panels the power to determine which disbursements will be eligible in each case, using a two-fold test of their relevance to the representation of the interest and their reasonableness.

Funding awards now provide funds in three categories: lawyers, consultants and disbursements. Intervenors appear to have the ability to shift funds to some extent within each category to reflect their unfolding needs, but not the ability to shift funds from one category to another. This is a reasonable limit and should be continued. It is important for the integrity of the IF process that intervenors attempt to follow their funded budgets. If material change occurs in the hearing itself, supplementary funding can be applied for. In addition, however, we recommend that, if staying within these three categories creates difficulties for an intervenor, the funding panel should have the power to remedy this by allowing a shift among the categories within the limits of the original award.

## I. Supplementary Funding

One of the areas in the IFPA where the three years of the pilot project have proved insufficient time to assess its impact is with respect to supplementary funding. Supplementary funding has only been applied for in two EAB and five OEB cases for a total of eight applicants (V. Tables 5 and 6). It is also a subject on which there were few submissions, presumably because there has been so little experience with it. As a result, our recommendations should be viewed in light of this lack of experience. We recommend that s. 12 of the IFPA be retained.

Section 12 incorporates sections 7 to 11 into the consideration of supplementary funding. This requires consideration of the eligibility criteria in s. 7 as they apply to the somewhat different questions arising at the time of a supplementary funding application. This is appropriate, although obviously some factors considered at the initial stage will be irrelevant at this later stage, such as whether the intervenor has an established record of concern. What it does do, however, is to allow the decision-maker to consider what has occurred in the hearing, in making its supplementary funding decision. Some relevant questions would be whether separate representation is still necessary, whether a coalition has held up over the course of the hearing, and how funds have been used to date. Such inquiries are entirely appropriate and should be continued. (It was done to some extent in the OWMC supplementary funding decision.) This recommendation that s.12 be retained should be considered in conjunction with our earlier recommendation that supplementary funding be awarded by the new independent funding panel and not by the main hearing panel. This ensures that the main hearing panel will not be able to use IF as a tool to steer the main hearing in any particular direction and also avoids any confusion between the purpose and application of IF and costs. It also allows a decision maker removed from the main hearing, the funding panel, to scrutinize thoroughly what has, in fact, transpired to the date of the funding application.

The only test for supplementary funding in s. 12 is the need for the board to find that, in the circumstances, the "original award was inadequate". This has been interpreted by the boards to mean a substantial change in the hearing has occurred, for example, a change in the proponent's case requiring new issues be addressed and new witnesses be examined or a longer than anticipated hearing time necessitating more funds for lawyers and consultants. This is an appropriate interpretation of this provision and, therefore, our conclusion is that no further amendment is necessary.

## J. Costs

As discussed earlier "Costs" are an award made at the end of a hearing by the main hearing panel. All participants, whether funded under IFPA or not, are, at present, eligible for costs. Costs are usually ordered to be paid by the proponent but a board is not required to award costs and can, though rarely does, order them to be paid by an intervenor if the board considers that party to have wasted the time of the tribunal or the other parties. These rules on costs are not now a part of IFPA. The only aspects of costs that are dealt with under IFPA are the provisions of Part II and the requirement that an IF award be deducted from a costs award, presumably in order to prevent double recovery.

Part II of the IFPA gives the power to award costs to the EAB and provides that all the subject boards are not limited to the considerations which govern costs awards in courts. This Part is not subject to the three year time limit on Part I, and we recommend that Part II be retained in its present form.

Costs is another area where the three years of the pilot project have yielded few decisions, particularly at the EAB, where only two costs awards have been made. However, at the OEB sufficient numbers of decisions have been rendered to detect a trend with respect to the provisions of s. 12(3) requiring the IF award be deducted from any costs awarded. The OEB has interpreted this section in a way that seems to view IF as an advance to an intervenor, subject to repayment in whole or in part at the end of a hearing. This is essentially how an interim costs award works at boards having this power. However, we believe it misconstrues the intent of IF not to provide some certainty of participation to responsible intervenors. We therefore recommend that s. 12(3) be amended to make it clear that an IF award will be deducted from a costs award but that if the costs award is less than the amount of IF actually and reasonably expended, there is no requirement of repayment to the proponent.

To deal with the situation of an intervenor who does not expend its award responsibly, s. 9(2) gives the board power to require that an intervenor repay the award in whole or in part to the proponent. This section has never been used but it is a necessary power for ensuring accountability. We therefore recommend retaining s.9(2).

The EAB and the OEB appear to take a different approach to the awarding of costs. The EAB appears to hear argument and making a ruling with respect to specific amounts applied for. The OEB, on the other hand, determines the parameters of the award, including who will pay it, who is entitled to costs and what proportion of each party's costs are recoverable; it is then left to an assessment officer to assess the specific costs of each party. This latter approach is preferable primarily because of the time-consuming nature of the task. We therefore recommend that the EAB adopt the practice of the OEB with respect to the assessment of costs.

## K. Payments of Funds and Accounting for Funds

Here again the EAB and the OEB differ in their approaches to how the IF award is actually paid out to the intervenors, with the EAB experiencing more difficulties. The EAB requires each intervenor to submit invoices for eligible costs incurred to the Ministry of the Environment's Finance and Capital Management Branch for approval prior to payment by the proponent. Some of the submissions criticized the delay involved in this process, which apparently can take six weeks between the submission of invoices and the receipt of payment. This creates difficulties for intervenors in making timely payments on outstanding bills.

The OEB, by contrast, orders awards paid in lump sums to each of the funded intervenors' lawyers to hold in their trust accounts. Payments are then made as costs are incurred and the lawyer is required to account to the board at the end of the hearing or that intervenor's participation. This approach minimizes the delay in making payments and has the added advantage of incorporating the professional rules on the treatment of trust funds and the supervisory role of the Law Society of Upper Canada in auditing solicitors' trust funds, increasing the accountability for expenditures of funds. The OEB's approach to the payment of funds is the preferred approach and we recommend that the EAB adopt it. It should be recognized that this approach may not be appropriate in very lengthy hearings, such as occur before the EAB, where a lump sum payment for three years' worth of funding may be unduly burdensome on a proponent. In these situations, interim payments should be provided for. In addition, other arrangements will be required where the intervenor is not represented by a lawyer.

Earlier we discussed the EAB recommendation that an independent intervenor funding agency be established to make funding decisions. The EAB would also have this agency administer funding programs. We received other submissions about the need to improve administration and monitoring of the awards for both Boards including "value for money" audits.

As we indicated earlier we are attracted to such recommendations but those receiving this report will have to satisfy themselves concerning questions about the costs of such an agency and its funding. These are critical issues in this atmosphere and we were unable to respond given the constraints within which we were functioning; the more so since the EAB provided its submission to us in the week we were to report.

One troubling aspect of the OEB's IF decisions, which flows directly from their use of lump sum payments, has been the use of a "holdback", where a certain percentage of an IF award is held back pending the completion of the hearing and the outcome of the costs decision. One EAB panel also imposed a holdback on an award, amounting to 15% of the award. As was discussed in the last section, it is our view that IF awards should be treated as certain, not as potentially repayable. We therefore recommend that the IFPA be amended to prohibit the imposition of a holdback on awarded funds.

The power to supervise IF awards is given to each board under s. 9 of the IFPA. Section 9(1) provides that it is a condition of every award that the board or its agents be allowed access to the intervenors' records to "insure that conditions set by the funding panel are being or have been met." This power is essential to ensure the accountability of intervenors. Our research did not reveal any difficulties or concerns with this provision and there should be no hesitancy in using it in appropriate circumstances. We therefore recommend that s. 9(1) of the IFPA be retained in its present form.

## L. OEB Staff

One significant difference in the operations of the OEB and the EAB/JB is the large staff the OEB has to assist it in carrying out its work. In recent years, one group of Board staff have participated in hearings to represent the broad public interest. Staff counsel scrutinize the proposal before the Board to draw out its impacts on the public interest through the presentation of evidence, cross-examination and argument. There is obviously the potential for overlap between the role of Board staff and the role of intervenors.

With respect to IF, OEB funding panels have criticized intervenors who did not attempt to coordinate their participation with that of Board staff so that duplication was avoided. In one case, the Funding Panel did not fund an intervenor to address certain issues of broad public concern (because the staff was considered the best participant to deal with them) but only funded the intervenor to address specific issues of concern to the interest it represented. Some of the submissions criticized the requirement that intervenors coordinate with Board staff on the grounds that staff represent all potentially affected interests so common ground with those representing a possibly conflicting specific interest is not possible in principle. Related to this concern but with a different emphasis, ONGA insisted that the Staff role be paramount (VI. E. (xiv)).

Given the established role of staff in OEB hearings, it is appropriate that they continue to play an important role. However, guidelines are necessary for IF purposes to regularize the consideration of coordination between funded intervenors and Board staff (under s. 7(2)(f)).

We therefore recommend that an intervenor seeking funding demonstrate a reasonable attempt to coordinate with Board staff as part of its obligations under s. 7(2)(f). As part of this attempt, Board staff should be required to articulate a plan of coordination within a reasonable time to the intervenor and the intervenor should be required to respond. The plan of coordination and the response should then be considered by the funding panel. It is recognized that in some cases coordination will not be possible. If it is not possible, it should not be forced, as was discussed in section F above. This is a determination that should be made by the funding panel, however constituted.

### M. Scheduling and Location of Hearings; Assistance to Intervenors

For most citizen intervenors, participating in a hearing is an overwhelming experience. Professionals acting for intervenors usually have experience with the language and procedures of tribunals, but for citizens coming to such proceedings for the first time or coming without professional representation, the entire process is unfamiliar and intimidating. Some submissions complained of the complex requirements of the hearing process and its bias toward professional representation, though, in fairness, such experiences say nothing about the hard work and responsibility many professionals bring to their duties. Still others criticized the scheduling and location of hearings which make it difficult for "non-professional" participants to attend. The EAB generally holds its hearings in the community where a proposed project is located. The two major exceptions to this approach are the OWMC hearing being held in Oakville and the DSP hearing being held in Toronto. The lengthy EAB hearing on the Class EA for Timber Management, which will affect most of northern Ontario has been held at various locations throughout the north and in Toronto to allow for participation by those who would not otherwise be able to attend. The OEB holds its hearings in Toronto.

Efforts of the boards to hold hearings in local centres and at flexible times to accommodate less traditional intervenors are important to making them more accessible to citizen intervenors and should be encouraged and we are aware that the Boards, particularly the EAB, do make attempts within the constraints on their resources. We recommend that the Boards' rules be amended to require them to consult with intervenors when establishing hearing locations and schedules. Other assistance to potential intervenors in terms of providing information about filling out funding applications and supplementary funding is also necessary and should be encouraged. If an independent intervenor funding agency were to be established it could undertake such assistance as part of its functions. In addition, every effort should be made to assist intervenors unrepresented by counsel. We believe that the EAB's recommendations to the EA Task Force and other's efforts for the establishment of an independent panel of experts that will be able to provide advice to intervenors may be a useful approach, again subject to funding considerations. A roster of lawyers, throughout the province, willing to act for intervenors at legal aid rates should be maintained.

## N. Aboriginal Groups

Aboriginal groups have intervened and received funding in only one hearing under IFPA, the DSP hearing, but they are also participating with funding in the EAB Timber Management hearing under Orders in Council. Funding for various aboriginal interests amounted to approximately $6,000,000 in the DSP and more than $900,000 out of the $1.65 million awarded in the Timber hearing. In awarding funding, the primary criteria imposed to limit funding to aboriginal groups appear to have been the need to coordinate to avoid duplication and the question of separate representation.

Unfortunately, despite our attempts, few submissions were received which addressed issues of particular concern to aboriginals or the impact of IFPA on them. The submissions that we received were conflicting or raised concerns that have gone unanswered by those most directly involved. For example, a solicitor for an aboriginal coalition in the DSP claimed that without IFPA her clients' participation would have been impossible. In contrast, a few submissions, not from aboriginals, raised concerns about the nature and extent of their involvement.

Without more input from aboriginals themselves, we are not able to reach any firm conclusions including how best to involve aboriginal people as decision makers. In order to discover the best way to answer these questions and to gain a better understanding of the needs of aboriginal people under IFPA, we recommend that a special study be commissioned to consider the needs of aboriginal people in hearings to which IFPA applies. Such a study should not be unduly costly or prolonged and should include aboriginal people in its design and conduct in order to minimize any possible cultural bias. At the same time, the study should also consider the impacts of its conclusions and recommendations on other regional interests, particularly in northern Ontario and representatives of these groups should also be involved.

### O. Municipalities

Municipalities have applied for and been awarded funding under IFPA and the Orders in Council at the EAB, Joint Board and the OEB, which has proved quite controversial. The controversy stems from the power of municipalities to raise money through taxes -- with this power, the argument runs, a municipality cannot have a need for funds and thus is not able to meet the most important criterion for IF. In most cases, this is probably true. For example, in the OWMC hearing Toronto and Milton were denied funds because they could reallocate the necessary funds for the scope of their proposed intervention. However, for many small municipalities facing extensive hearings, raising taxes is not a practical option. For this reason, we recommend that municipalities should be eligible for funding if they can demonstrate need, that is, the situation that exists at present.

One problem that has arisen at the Joint Board with respect to municipalities has been the assumption in two cases that a funded municipality should be the lead intervenor funded to represent the interests of community groups made up of its citizens and others. In these cases, intervenors with quite different perspectives from that of the municipality were effectively denied funding through a forced coalition. The assumption behind these decisions is faulty and denies legitimate intervenors the right to participate. We therefore recommend that the IFPA be amended to make clear that coordination between municipalities and other intervenors not be forced on the assumption that a municipality represents the interests of its citizens. In each case, reasonable attempts at coordination should be made by intervenors with similar perspectives. If those efforts fail, coordination should not be forced.

## P. Appeal and Review of Decisions

Section 13 of IFPA provides for an appeal of any funding decision on a question of law only to the Ontario Court of Justice. This is an appropriate appeal mechanism and should be retained. The right of appeal should not be extended to provide a "political" appeal to a Minister or Cabinet. In this regard we are in agreement with the EAB's reasons and recommendations (VI.E. (xviii)). The complex task of the funding panel should be allowed to stand subject to any error of law.

We, therefore, recommend that the Intervenor Funding Act explicitly provide that an appeal of the decision of a funding panel is available to the Ontario High Court on questions of law and not to any Minister or to Cabinet.

We also agree with those submissions that an appeal of a funding decision should be exercised expeditiously and should not trigger a stay of the proceedings. We, therefore, recommend that an appeal must be launched within thirty days and that this requirement can be relieved against by the appeal court only by a showing that no substantial prejudice to the proceedings will result. In any event, such an appeal should not trigger a stay of either any funding proceedings or main hearing proceedings. Applicable documents of the Boards should indicate prominently the limits on the appeal period.

A different point concerning appeals involves the financial wherewithal of intervenors to launch or participate in appeals or judicial review applications from decisions in the main hearing. The financing of any such procedures will not be provided for in any intervenor funding award. Yet, without funding, intervenors may not have access to such proceedings either to initiate or participate in them. We, therefore, recommend that funding for appeals or judicial reveiw should be available to intervenors. If the proponent initiates the proceedings the intervenors seeking funding should have to demonstrate what their role should be and the necessary expenses of that role. If intervenors wish to initiate the proceeding there should be some review of the merits akin to the intervenors demonstrating that the proceedings are not frivolous and vexatious and that it is reasonably likely that they will succeed. The application for funding for appeals or judicial review should be to the funding panel. Since this is an entirely new recommendation we do not propose altering the otherwise applicable provisions for costs in court proceedings.

Again, this recommendation if accepted should be specifically assessed in the subsequent review that has been recommended.

## Q. Special Rules for Complex and Lengthy Hearings

Of particular concern at the EAB and Joint Board are the very lengthy and complex hearings that take place, usually under the EAA. Examples are the OWMC, Timber Class EA and Ontario Hydro DSP. These types of hearings strain the limits of the IFPA and because of their numerous participants and special problems require special treatment. We therefore recommend that special rules be developed for application as needed to complex and lengthy hearings.

While it is important that these rules for special hearings be developed, they should not be mandatory. They should be applicable at the discretion of the particular funding panel. In this way, the details of the funding procedure can be dovetailed with the needs of each hearing, which may vary greatly from case to case. We note the recommendations of the EA Task Force and the EAB with respect to the development of special procedures for "plan and program" EAs. If these recommendations are adopted, their implications for intervenor funding should be reviewed.

Some of the details that should be considered for inclusion in these rules are: provision for early funding, particularly to enable effective participation in scoping sessions; staging of funding, as with the DSP, whereby funds for coordination attempts and development of detailed participation plans can be provided; periodic assessment of the use of funds and the discharge of obligations toward other intervenors during the main hearing; carefully monitored mediation of some issues; and the periodic awarding of interim costs so that parties do not need to wait for years to recover some of their costs. This is an area where consultation with counsel appearing before the Boards, perhaps through the establishing of an Advisory Board, would be desirable.

## IX. SUMMARY OF RECOMMENDATIONS

1. IFPA should be made permanent, with a review after three years.
2. Intervenor funding should not be aligned with the criteria for awarding costs. Need and public interest issues should continue to be the focus of intervenor funding.
3. Intervenor funding should be paid for by the proponent.
4. IFPA subsection 8(3) permitting a panel to refuse to make an award or reduce it because of "significant financial hardship" to the funding proponent should be retained.
5. Consultation should be carried out and decisions made regarding expansion of IFPA to the Ontario Municipal Board and the Environmental Appeal Board within the next three year review period.
6. An independent funding agency should be established - so long as the costs of such an agency are acceptable.
7. The chair of the funding agency should have authority to appoint as many members of a funding panel as are necessary.
8. The IFPA should be amended to provide that an oral hearing is not mandatory for every funding decision and to provide that the Statutory Powers Procedure Act does not apply.

9. The definition of proponent should be expanded to permit the naming of a funding proponent in a generic hearing called on the initiative of the Ontario Energy Board.
10. IFPA should be amended to apply, where relevant, to pre-hearing phases of a process. There should be monitoring of this provision to determine whether its goals of scoping and early resolution of issues are met.
11. IFPA should be amended to clarify the ability of the hearing panel to determine the relevant issues and matters of jurisdiction and hearing format prior to the complete determination of funding applications.
12. IFPA should be amended to allow the funding panel to determine entitlement to funding and to make awards to intervenors to participate in the initial scoping and issue identification phase of the hearing.
13. The criteria for funding in ss. 7(1) and 7(2) of IFPA should be retained, with some modifications.
14. Need should continue to be an important criterion for funding.
15. IFPA should be amended to provide that all of the criteria should be considered, but that not all of the criteria need be met in every case.
16. IFPA should be amended to provide that the criteria of ascertainable interest (s.7(2)(a)) and separate and adequate representation (s.7(2)(b)) be determined with reference to the different perspectives of the intervenors.
17. Section 7(2)(f) should be amended to provide that where coordination appears to be possible, the intervenors have the burden of showing, with due attention to their perspective, why coordination should not be required.
18. IFPA should be amended to require proponents to disclose their costs of the proceedings and of the undertaking.
19. The limit on lawyers' fees of the Legal Aid rate should be retained.
20. IFPA s.7(5) - dealing with eligible disbursements" - should be replaced with a provision giving funding panels the power

to determine which disbursements will be eligible in each case on the basis of "relevance" and "reasonableness."

21. Funded intervenors should be able to shift funds within funding categories but should not be able to shift funds from one category to another without approval of the funding panel.
22. Section 12 - dealing with supplementary funding - should be retained with some modifications. Supplementary funding should be awarded by the independent funding agency and not by the hearing panel. Supplementary funding should be awarded where there has been an unanticipated and substantial change in a proceeding.
23. Costs should continue to be awarded by the hearing panel; Part II of IFPA should be retained.
24. Section 12(3) should be amended to make it clear that a funding award will be deducted from a costs award but that, if a costs award is less than the amount of funding actually and reasonably expended, there is no requirement of repayment of the funding award.
25. Section 9(2) - allowing the boards to require repayment where conditions of an award have not been met - should be retained.
26. The EAB should adopt the OEB's funding practice, in awarding costs, regarding their assessment. An independent agency, if established, should administer and monitor awards.
27. The EAB should adopt the practice of providing funding awards in lump sums to the solicitors of intervenors.
28. IFPA should be amended to prohibit the imposition of a holdback on awarded funds.
29. Section 9(1) - giving the boards access to intervenors records to ensure conditions are met - should be retained.
30. OEB staff should continue to play an important role in hearing. An intervenor seeking funding and OEB staff should attempt to coordinate.
31. Boards should make efforts to hold hearings in local centres and at flexible times. Boards' rules should be amended to

require them to consult with intervenors when establishing hearing location and schedules.

32. A special study should be commissioned to consider the needs of aboriginal peoples in hearings to which IFPA applies.

33. Municipalities should continue to be eligible for funding if they can demonstrate need.

34. IFPA should be amended to make clear that coordination between municipalities and other intervenors should not be forced on the assumption that municipalities represent the interests of their citizens.

35. IFPA should provide that an appeal of a funding decision is available to the court on a question of law and not to any minister or the Cabinet.

36. IFPA should be amended to require an appeal to be launched within thirty days of a decision, unless no substantial prejudice would result (in the opinion of the court). Appeals should not operate as a stay of either funding or main hearing proceedings.

37. IFPA should be amended to provide for funding for appeals and judicial review applications if certain conditions are met.

38. Special rules should be developed for application, as needed, to complex and lengthy hearings.

# APPENDICES

Appendix A - Text of the Intervenor Funding Project Act
Appendix B - File Instrument
Appendix C - Issues Paper & Letters
Appendix D - Newspapers Advertised In
Appendix E - List of Submissions
Appendix F - List of Interviewees
Appendix G - EAB & OEB Recommendations

# APPENDIX A

# TEXT OF THE INTERVENOR FUNDING PROJECT ACT

Bill 174

1st SESSION, 34th LEGISLATURE, ONTARIO
37 ELIZABETH II, 1988

# Bill 174

*(Chapter 71
Statutes of Ontario, 1988)*

**An Act for the
establishment and conduct of a
Project to provide
Funding to Intervenors in
proceedings before a
Joint Board
under the
Consolidated Hearings Act, 1981
and before the
Ontario Energy Board
and the
Environmental Assessment Board
and to provide for
certain matters in relation to
costs before those Boards**

The Hon. I. Scott
*Attorney General*

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|---|---|
| *1st Reading* | June 29th, 1988 |
| *2nd Reading* | December 14th, 1988 |
| *3rd Reading* | December 15th, 1988 |
| *Royal Assent* | December 15th, 1988 |

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Projet de loi 174

1re SESSION, 34e LÉGISLATURE, ONTARIO
37 ELIZABETH II, 1988

# Projet de loi 174

*(Chapitre 71
Lois de l'Ontario de 1988)*

**Loi concernant la mise sur pied
et la direction d'un projet visant
à fournir une aide financière
aux intervenants dans
des affaires instruites devant
une commission mixte créée
en vertu de la Loi de 1981
sur la jonction des audiences,
devant la Commission de
l'énergie de l'Ontario et
devant la Commission des
évaluations environnementales
et visant certaines questions
relatives aux dépens adjugés
par ces commissions**

L'honorable I. Scott
*procureur général*

| | |
|---|---|
| *1re lecture* | 29 juin 1988 |
| *2e lecture* | 14 décembre 1988 |
| *3e lecture* | 15 décembre 1988 |
| *sanction royale* | 15 décembre 1988 |

Imprimé avec l'autorisation
de l'Assemblée législative par
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## Bill 174 1988

### An Act for the establishment and conduct of a Project to provide Funding to Intervenors in proceedings before a Joint Board under the Consolidated Hearings Act, 1981 and before the Ontario Energy Board and the Environmental Assessment Board and to provide for certain matters in relation to costs before those Boards

**HER MAJESTY**, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

### PART I

### INTERVENOR FUNDING

Définitions **1.** In this Part,

"commission" "board" means a joint board, the Ontario Energy Board or the Environmental Assessment Board;

"comité d'aide financière" "funding panel" means an intervenor funding panel appointed under this Part;

"promoteur tenu de verser une aide financière" "funding proponent" means a proponent who has been named by a funding panel as a funding proponent;

"intervenant" "intervenor" means a person or group of persons that has been granted status as an intervenor in a proceeding before a board;

"aide financière aux intervenants" "intervenor funding" means funding awarded under this Part to an intervenor in advance of a hearing before a board;

"commission mixte" 1981, c. 20 "joint board" means a joint board established under the *Consolidated Hearings Act, 1981* to consider a matter arising under the *Environmental Assessment Act*, the

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## Projet de loi 174 1988

### Loi concernant la mise sur pied et la direction d'un projet visant à fournir une aide financière aux intervenants dans des affaires instruites devant une commission mixte créée en vertu de la Loi de 1981 sur la jonction des audiences, devant la Commission de l'énergie de l'Ontario et devant la Commission des évaluations environnementales et visant certaines questions relatives aux dépens adjugés par ces commissions

SA MAJESTÉ, sur l'avis et avec le consentement de l'Assemblée législative de la province de l'Ontario, décrète ce qui suit :

### PARTIE I

### AIDE FINANCIÈRE AUX INTERVENANTS

**1** Les définitions qui suivent s'appliquent à la présente loi. Definitions

«aide financière aux intervenants» Aide financière accordée aux intervenants en vertu de la présente partie avant une audience devant une commission. «intervenor funding»

«comité d'aide financière» Comité d'aide financière aux intervenants constitué aux termes de la présente partie. «funding panel»

«commission» Une commission mixte, la Commission de l'énergie de l'Ontario ou la Commission des évaluations environnementales. «board»

«commission mixte» Commission mixte créée en vertu de la *Loi de 1981 sur la jonction des audiences* pour examiner une question se rapportant à la *Loi sur les évaluations environnementales*, la *Loi sur la protection de l'environnement* ou la *Loi sur les ressources en eau de l'Ontario*. «joint board» 1981, chap. 20 [illegible]

R.S.O. 1980, cc. 140, 141, 361

*Environmental Protection Act* or the *Ontario Water Resources Act*;

"proponent"

"proponent" means a party whose undertaking, in the opinion of a funding panel, is the subject-matter of the hearing or another party or individual or corporation, who, in the opinion of a funding panel, is potentially a major financial beneficiary of the decision of the board.

Purpose

**2.** The purpose of this Part is to provide for the establishment and conduct of a pilot project related to the provision of intervenor funding in proceedings before boards.

Right to apply for intervenor funding

**3.**—(1) An intervenor in a proceeding before a board may apply to the board, as provided under this Part, for intervenor funding.

Notice

(2) A board shall set out in its notices of hearing,

(a) a statement of the right set out in subsection (1); and

(b) a brief statement of where and when applications for status as an intervenor can be made.

Idem

(3) As soon as all applications for intervenor status have been decided, the board shall notify all intervenors of their right to apply for intervenor funding and it shall forthwith advise the intervenors of the last date for making an application.

Adjournment

(4) After determining all issues related to intervenor status, a board shall not proceed further with a hearing,

(a) until the last date for applying for intervenor funding has passed and no applications are received; or

(b) until the funding panel for the hearing has advised the board that all applications for intervenor funding have been decided if any applications are received.

«intervenant»

«intervenant» Personne ou groupe de personnes qui s'est vu accorder la qualité d'intervenant dans une instance devant une commission.

«proposant»

«proposant» Partie dont l'entreprise, de l'avis d'un comité d'aide financière, fait l'objet de l'audience, ou une autre partie, personne physique ou personne morale qui, de l'avis d'un comité d'aide financière, est potentiellement un bénéficiaire financier majeur de la décision de la commission.

funding proponent

«proposant tenu de verser une aide financière» Proposant qu'un comité d'aide financière nomme comme proposant tenu de verser une aide financière aux intervenants.

Objet

**2** L'objet de la présente partie est de prévoir la mise sur pied et la direction d'un projet pilote visant à fournir une aide financière aux intervenants dans les instances devant les commissions.

Droit de demander une aide financière

**3** (1) Un intervenant dans une instance devant une commission peut demander à celle-ci, comme le prévoit la présente partie, une aide financière aux intervenants.

Avis

(2) Figurent dans les avis d'audience d'une commission :

a) une déclaration relative au droit énoncé au paragraphe (1);

b) une courte déclaration indiquant où et quand les demandes d'octroi de la qualité d'intervenant peuvent être présentées.

Idem

(3) Dès qu'une décision a été rendue relativement à toutes les demandes d'octroi de la qualité d'intervenant, la commission avise tous les intervenants de leur droit de faire une demande d'aide financière aux intervenants. Elle avise sans délai les intervenants de la date limite de présentation de cette dernière demande.

Ajournement

(4) Après avoir décidé toutes les questions relatives à la qualité d'intervenant, une commission ne doit pas poursuivre une audience :

a) avant que la date limite pour faire une demande d'aide financière aux intervenants ne soit passée, si aucune demande n'a été reçue;

b) avant que le comité d'aide financière constitué pour l'audience ne l'informe qu'il a statué sur toutes les demandes d'aide financière aux intervenants, si des demandes ont été reçues.

Intervenor funding panel required

**4.**—(1) An intervenor funding panel shall be appointed for a hearing before a board if any applications are received for intervenor funding.

Duty of funding panels

(2) A funding panel shall determine, with respect to the hearing for which it is appointed, all issues related to the determination of who are the proponents and funding proponents and eligibility for intervenor funding and the amount of the funding.

Restriction

(3) A member of a funding panel shall not determine any issue in the hearing for which the panel was appointed other than those referred to in subsection (2).

Composition and appointment of funding panels

**5.**—(1) Except in the case of a joint board, a funding panel shall consist of one person named by the chairperson of the board from among its members.

Idem

(2) The funding panel of a joint board shall consist of one person named by the chairperson of the Ontario Municipal Board from among its members and one person named by the chairperson of the Environmental Assessment Board from among its members.

Chairperson

(3) The member named under subsection (2) by the chairperson of the Environmental Assessment Board shall be the chairperson of the funding panel of the joint board.

Decisions of joint board

(4) If the members of the funding panel of a joint board are unable to reach a common decision, the decision of the panel's chairperson shall be deemed to be the panel's decision.

Funding proponents

**6.**—(1) Before dealing with any applications for intervenor funding, a funding panel shall determine who is or are the funding proponents.

Notice

(2) For purposes of the determination required by subsection (1), a funding panel shall give notice to a proponent of its intention to name the proponent as a funding proponent.

Hearing

(3) If a proponent who receives a notice under subsection (2) files with the board an objection to being named as a funding proponent, the funding panel shall hold a hearing to determine whether the proponent will be named as a funding proponent.

Comité d'aide financière

**4** (1) Un comité d'aide financière est constitué pour une audience devant une commission si celle-ci reçoit des demandes d'aide financière aux intervenants.

Devoir des comités d'aide financière

(2) Un comité d'aide financière décide, relativement à l'audience pour laquelle il a été constitué, toutes les questions relatives à l'identité des proposants, à l'identité des proposants tenus de verser une aide financière, à l'admissibilité des demandeurs à l'aide financière aux intervenants et au montant de l'aide financière accordée.

Réserve

(3) Un membre d'un comité d'aide financière ne doit trancher, à l'audience pour laquelle le comité a été constitué, aucune question qui n'est pas visée au paragraphe (2).

Composition et constitution des comités d'aide financière

**5** (1) Sauf dans le cas d'une commission mixte, un comité d'aide financière se compose d'une personne nommée par le président de la commission parmi les membres de celle-ci.

Idem

(2) Le comité d'aide financière d'une commission mixte se compose d'une personne nommée par le président de la Commission des affaires municipales de l'Ontario parmi les membres de celle-ci et d'une personne nommée par le président de la Commission des évaluations environnementales parmi les membres de celle-ci.

Président

(3) Le membre nommé aux termes du paragraphe (2) par le président de la Commission des évaluations environnementales préside le comité d'aide financière de la commission mixte.

Décision de la commission mixte

(4) Si les membres du comité d'aide financière d'une commission mixte ne peuvent pas s'entendre sur une décision, la décision du président du comité est réputée la décision du comité.

Proposants tenus de verser une aide financière

**6** (1) Avant de traiter une demande d'aide financière aux intervenants, un comité d'aide financière décide de l'identité des proposants tenus de verser une aide financière.

Avis

(2) Aux fins de la décision qu'exige le paragraphe (1), un comité d'aide financière avise un proposant de son intention de nommer le proposant comme proposant tenu de verser une aide financière aux intervenants.

Audience

(3) Si un proposant qui reçoit un avis aux termes du paragraphe (2) dépose auprès de la commission une objection à être nommé comme proposant tenu de verser une aide financière, le comité d'aide financière tient une audience pour décider si le proposant sera nommé comme proposant tenu de verser une aide financière.

**Deemed funding proponent**

(4) A proponent who does not file an objection within the time allowed by the funding panel shall be named as a funding proponent.

**Power of board**

(5) A funding panel may decide that there is no funding proponent.

**Party status**

(6) A funding proponent is entitled to be a party to hearings before the funding panel and with respect to applications under section 12.

**Eligibility for intervenor funding**

7.—(1) Intervenor funding may be awarded only in relation to issues,

(a) which, in the opinion of the funding panel, affect a significant segment of the public; and

(b) which, in the opinion of the funding panel, affect the public interest and not just private interests.

**Idem**

(2) In deciding whether to award intervenor funding to an intervenor, the funding panel shall consider whether,

(a) the intervenor represents a clearly ascertainable interest that should be represented at the hearing;

(b) separate and adequate representation of the interest would assist the board and contribute substantially to the hearing;

(c) the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;

(d) the intervenor has made reasonable efforts to raise funding from other sources;

(e) the intervenor has an established record of concern for and commitment to the interest;

(f) the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing;

(g) the intervenor has a clear proposal for its use of any funds which might be awarded; and

**Réputé proposant tenu de verser une aide financière**

(4) Un proposant qui ne dépose pas d'objection dans le délai imparti par le comité d'aide financière est nommé comme proposant tenu de verser une aide financière.

**Pouvoir du comité**

(5) Le comité d'aide financière peut décider qu'il n'y a aucun proposant tenu de verser une aide financière.

**Partie à l'audience**

(6) Un proposant tenu de verser une aide financière est partie aux audiences devant le comité d'aide financière, ainsi qu'aux demandes présentées en vertu de l'article 12.

**Admissibilité à une aide financière aux intervenants**

7 (1) L'aide financière aux intervenants n'est accordée qu'à l'égard de questions qui, de l'avis du comité d'aide financière :

a) touchent une partie importante du public;

b) concernent l'intérêt public et non seulement des intérêts privés.

**Idem**

(2) Lorsqu'il décide s'il doit accorder à un intervenant l'aide financière aux intervenants, le comité d'aide financière examine si :

a) l'intervenant représente un intérêt clairement établi qu'il y a lieu de représenter à l'audience;

b) une représentation distincte et satisfaisante de l'intérêt serait utile à la commission et contribuerait de façon importante à l'audience;

c) l'intervenant ne dispose pas de ressources financières suffisantes pour lui permettre de représenter l'intérêt de façon satisfaisante;

d) l'intervenant a fait des efforts raisonnables pour se procurer des fonds par d'autres moyens;

e) l'intervenant s'est prononcé et engagé en faveur de l'intérêt par le passé;

f) l'intervenant a tenté d'effectuer un regroupement d'intérêts connexes dont il a connaissance à des fins de représentation à l'audience;

g) l'intervenant a clairement formulé l'utilisation qu'il se propose de faire des fonds qui pourraient lui être octroyés;

(h) the intervenor has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award.

Idem

(3) In determining the amount of an award of intervenor funding, the funding panel shall,

(a) if the proposal includes the use of lawyers in private practice, assess legal fees at the legal aid rate under the legal aid plan in effect on the day of the award for work necessarily and reasonably performed;

(b) set a ceiling in respect of disbursements that may be paid as part of the award and such disbursements shall be restricted to eligible disbursements,

(c) deduct from the award funds that are reasonably available to the applicant from other sources

Idem

(4) A funding panel may award intervenor funding subject to such conditions as it sets out in its order.

Definition "débours remboursables"

(5) In clause (3) (b), "eligible disbursements" means disbursements for consultants, expert witnesses, typing, printing, copying and transcripts necessary for the representation of the interest and such other expenditures as may be named in the regulations made under this Part as eligible disbursements

Proponent to pay

8.—(1) An award of intervenor funding is an award against the funding proponent named in the order of the funding panel and shall be paid by the funding proponent at the times and in the amounts specified in the panel's order.

Idem

(2) If there is more than one funding proponent, the funding panel may determine the proportion of an award of intervenor funding that each funding proponent shall pay.

Idem

(3) If the funding panel is of the opinion that an award of intervenor funding will result in significant financial hardship to the funding proponent, the panel may refuse to make the award or it may reduce the size of the award.

Supervision

9.—(1) It is a condition of every award of intervenor funding that the intervenor in whose favour an award is made allow the board under whose jurisdiction the award was made, or its agents, access to the books and records of the intervenor to insure that conditions set by the funding panel are being or have been met.

---

h) l'intervenant dispose de moyens comptables suffisants pour garantir que les fonds octroyés, le cas échéant, sont utilisés aux fins reconnues.

Idem

(3) Lorsqu'il décide du montant accordé au titre de l'aide financière aux intervenants, le comité d'aide financière :

a) évalue les frais de justice pour les travaux nécessaires et raisonnables effectués, selon le barème du régime d'aide juridique en vigueur à la date de l'octroi de l'aide financière, si la proposition comprend le recours à des avocats établis en pratique privée ;

b) fixe un plafond à l'égard des débours qui peuvent être versés comme partie du montant accordé, ces débours étant limités aux débours remboursables ;

c) déduit du montant accordé les sommes que l'auteur de la demande peut raisonnablement se procurer par d'autres moyens.

Idem

(4) Un comité d'aide financière peut soumettre l'octroi d'une aide financière aux intervenants aux conditions qu'il énonce dans son ordre.

Définition «eligible disbursements»

(5) À l'alinéa (3) b), «débours remboursables» s'entend des débours pour les experts-conseils, les témoins experts et les travaux de dactylographie, d'impression, de photocopie et de transcription nécessaires à la représentation de l'intérêt et toute autre dépense qualifiée de remboursable dans les règlements pris en application de la présente partie.

Remboursement par le proposant

8 (1) Le proposant tenu de verser une aide financière nommé dans l'ordre du comité d'aide financière est condamné à verser l'aide financière accordée dans les délais et aux montants précisés dans cet ordre.

Idem

(2) S'il y a plus d'un proposant tenu de verser une aide financière, le comité d'aide financière peut déterminer la part de l'aide financière aux intervenants que verse chaque proposant tenu de verser une aide financière.

Idem

(3) Si le comité d'aide financière est d'avis que la condamnation à verser une aide financière aux intervenants entraînera un préjudice financier grave pour le proposant tenu de verser une aide financière, il peut refuser d'accorder le montant ou le diminuer.

Supervision

9 (1) Les montants accordés au titre de l'aide financière aux intervenants le sont à la condition que l'intervenant bénéficiaire du montant donne à la commission compétente ou à

Enforcement of conditions

(2) If an intervenor fails without reasonable cause to comply with the conditions of an award, the intervenor and its directors and officers, upon the order of the board, shall be jointly and severally liable to repay to the proponent the amount of the award, or such part thereof, as the board may order.

Rules

**10.** Rules regulating the practice and procedure for matters to be determined under this Act in relation to hearings before a board may be made in the same manner as rules regulating the practice and procedure of the board.

Regulations

**11.** The Lieutenant Governor in Council may make regulations naming expenditures that shall be considered to be eligible disbursements.

Supplementary funding

**12.**—(1) An intervenor who has received intervenor funding may apply to the board at any time up to the end of the hearing for supplementary funding and the board may award the funding if it is of the opinion, having regard to all of the circumstances, that the original award was inadequate.

Idem

(2) Sections 7 to 11 apply with necessary modifications to supplementary funding.

Costs

(3) The amount of intervenor funding received by an intervenor shall be deducted by the board from any costs awarded to the intervenor.

Appeals

**13.**—(1) An appeal lies only on a matter of law with respect to a decision on intervenor funding.

High Court

(2) An appeal shall be commenced by way of application to the High Court and shall be heard by a single judge.

Powers of judge

(3) If the judge finds an error of law, the judge may,

(a) make any order or decision that the funding panel or board, as the case may be, ought to have or could have made;

(b) order a rehearing by the funding panel or the board, as the case may be;

ses représentants accès à ses livres et dossiers afin de garantir que les conditions imposées par le comité d'aide financière sont ou ont été respectées.

(2) Si un intervenant, sans motifs valables, ne se conforme pas aux conditions de l'octroi d'une aide financière, l'intervenant, ses administrateurs et ses dirigeants sont solidairement tenus de rembourser au proposant, sur ordre de la commission, tout ou partie du montant accordé, selon ce qu'ordonne la commission.

Mise à exécution

**10** Des règles peuvent être établies pour régir la pratique et la procédure relatives aux questions à trancher aux termes de la présente loi dans le cadre d'audiences devant une commission, de la même manière que les règles pour régir la pratique et la procédure de la commission.

Règles

**11** Le lieutenant-gouverneur en conseil peut, par règlement, énumérer les dépenses qui constituent des débours remboursables.

Règlements

**12** (1) Un intervenant qui a reçu une aide financière aux intervenants peut, jusqu'à la fin de l'audience, présenter à la commission une demande d'aide financière supplémentaire. La commission peut accorder cette aide financière si elle estime, eu égard à l'ensemble des circonstances, que le montant initialement accordé était insuffisant.

Aide financière supplémentaire

(2) Les articles 7 à 11 s'appliquent, avec les adaptations nécessaires, à l'aide financière supplémentaire.

Idem

(3) La commission déduit des dépens adjugés à un intervenant le montant de l'aide financière aux intervenants obtenue par l'intervenant.

Dépens

**13** (1) Il peut être interjeté appel uniquement d'une question de droit relative à une décision sur l'aide financière aux intervenants.

Appels

(2) Un appel est introduit par voie de requête présentée à la Haute Cour. Il est entendu par un seul juge.

Haute Cour

(3) Si le juge constate une erreur de droit, il peut :

Pouvoirs du juge

a) rendre l'ordonnance ou prendre la décision que le comité d'aide financière ou la commission, selon le cas, aurait dû ou aurait pu rendre ou prendre;

b) ordonner une nouvelle audition par le comité d'aide financière ou par la commission, selon le cas,

(c) dismiss the appeal.

Crown bound

**14.** This Part binds the Crown.

Application

**15.** This Part applies only to hearings in relation to which public notice of hearing is first given after the coming into force of this section.

Repeal

**16.**—(1) This Part is repealed on the day that is three years after the day it comes into force or on such day thereafter as is named by proclamation of the Lieutenant Governor.

Transitional

(2) Proceedings commenced before the repeal of this Part shall be taken up and completed as if it had not been repealed.

## PART II

### AMENDMENTS TO CERTAIN ACTS

**17.** Section 7 of the *Consolidated Hearings Act, 1981*, being chapter 20, is amended by adding thereto the following subsection:

Considerations not limited

(7) In awarding costs, a joint board is not limited to the considerations that govern awards of costs in any court.

**18.** Section 18 of the *Environmental Assessment Act*, being chapter 140 of the Revised Statutes of Ontario, 1980, is amended by adding thereto the following subsections:

Costs

(16a) The Board may award the costs of a proceeding before it.

Payment

(16b) The Board may order to whom and by whom the costs are to be paid.

Assessment

(16c) The Board may fix the amount of the costs or direct that the amount be assessed and it may direct the scale according to which they are to be assessed and by whom they are to be assessed.

Considerations not limited

(16d) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

**19.** Subsections 33 (5), (6), (7) and (8) of the *Environmental Protection Act*, being chapter 141 of the Revised Statutes of Ontario, 1980, as enacted by the Statutes of Ontario, 1988, chapter 54, section 22, are repealed.

c) rejeter l'appel.

**14** La présente partie lie la Couronne.

La Couronne est liée

**15** La présente partie s'applique uniquement aux audiences à l'égard desquelles un premier avis d'audience public est donné après l'entrée en vigueur du présent article.

Champ d'application

**16** (1) La présente partie est abrogée trois ans après son entrée en vigueur ou à une date ultérieure que le lieutenant-gouverneur fixe par proclamation.

Abrogation

(2) Les instances introduites avant l'abrogation de la présente partie sont poursuivies et menées à bien comme si la présente partie n'avait pas été abrogée.

Disposition transitoire

## PARTIE II

### MODIFICATION DE CERTAINES LOIS

**17** L'article 7 de la *Loi de 1981 sur la jonction des audiences*, qui constitue le chapitre 20, est modifié par adjonction du paragraphe suivant :

(7) In awarding costs, a joint board is not limited to the considerations that govern awards of costs in any court.

Considerations not limited

**18** L'article 18 de la *Loi sur les évaluations environnementales*, qui constitue le chapitre 140 des Lois refondues de l'Ontario de 1980, est modifié par adjonction des paragraphes suivants :

(16a) The Board may award the costs of a proceeding before it.

Costs

(16b) The Board may order to whom and by whom the costs are to be paid.

Payment

(16c) The Board may fix the amount of the costs or direct that the amount be assessed and it may direct the scale according to which they are to be assessed and by whom they are to be assessed.

Assessment

(16d) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

Considerations not limited

**19** Les paragraphes 33 (5), (6), (7) et (8) de la *Loi sur la protection de l'environnement*, qui constitue le chapitre 141 des Lois refondues de l'Ontario de 1980, adoptés par l'article 22 du chapitre 54 des Lois de l'Ontario de 1988, sont abrogés.

**20.** Section 28 of the *Ontario Energy Board Act*, being chapter 332 of the Revised Statutes of Ontario, 1980, is amended by adding thereto the following subsection:

Considerations not limited

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

**21.** Subsections 53 (5), (6), (7) and (8) of the *Ontario Water Resources Act*, being chapter 361 of the Revised Statutes of Ontario, 1980, as enacted by the Statutes of Ontario, 1988, chapter 54, section 53, are repealed.

Application

**22.** The amendments set out in sections 17, 18 and 20 apply only to hearings in relation to which public notice of hearing is first given after the coming into force of this section.

Commencement

**23.** This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

**24.** The short title of this Act is the *Intervenor Funding Project Act, 1988*.

**20** L'article 28 de la *Loi sur la Commission de l'énergie de l'Ontario*, qui constitue le chapitre 332 des Lois refondues de l'Ontario de 1980, est modifié par adjonction du paragraphe suivant :

Considérations non limitées

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court

**21** Les paragraphes 53 (5), (6), (7) et (8) de la *Loi sur les ressources en eau de l'Ontario*, qui constitue le chapitre 361 des Lois refondues de l'Ontario de 1980, adoptés par l'article 53 du chapitre 54 des Lois de l'Ontario de 1988, sont abrogés.

Champ d'application

**22** Les modifications indiquées aux articles 17, 18 et 20 s'appliquent uniquement aux audiences à l'égard desquelles un premier avis d'audience public est donné après l'entrée en vigueur du présent article.

Entrée en vigueur

**23** La présente loi entre en vigueur le jour que le lieutenant-gouverneur fixe par proclamation

Titre abrégé

**24** Le titre abrégé de la présente loi est *Loi de 1988 sur le projet d'aide financière aux intervenants*

# APPENDIX B
# FILE INSTRUMENT

NAME &
FILE NO. ______________________________________________

DRAFT #5 - NOV.5

## INTERVENOR FUNDING PROJECT ACT
## SURVEY OF FILES

---

Initial of Researcher:______

State source within file for specific information where indicated, e.g. reasons for dec, (r.d., p.#). Add pages as needed. Indicate clearly which question you are supplementing, e.g. (p.10, q.25).

---

A. How many intervenors in total in this case?_______________

B. How many proponents in total in this case?_______________

C. Who conducted the Funding Hearing?_________________________________

D. Who were the Board members on the substantive hearing?

_______________________________________________________________________

_______________________________________________________________________

_______________________________________________________________________

_______________________________________________________________________

E. Length of the Funding Hearing to the nearest 1/2 day?______________

1. Board before which the substantive matter was heard:
   [ ] EAB
   [ ] JB
   [ ] OEB

2. Name of the case: ______________________________

3. Corresponding board designated file number: ____________

4. Intervenor participation:

   [ ] Prior to the passage of the IFPA

   [ ] Subsequent to the IFPA

5. Name of proponent: ______________________________

Address: ______________________________

______________________________

______________________________
Postal Code

______________________________
Telephone Number

______________________________
Fax

Primary contact person(s): ______________________________

Title: ______________________________

Function: ______________________________

Address: ______________________________
(if different)

______________________________

______________________________
Postal Code

______________________________
Telephone Number

______________________________
Fax

Counsel retained

[ ] Yes Date retained: /___/___/___
/mm/dd/yy

________________________________
Name of Counsel

________________________________

________________________________
Address

________________________________
City Postal Code

________________________________
Telephone Number

________________________________
Fax

[ ] No, why not [source:______, p.__]

________________________________

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6. Proponents Application: [source:______, p.__]

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7. Status of proponent challenged? [source:______, p.__]
State specifics, results and reasons?

8. Intervenors encouraged/required to coordinate with intervenors: [source:______, p.__]

[ ] No

[ ] Yes

Specifics:

9. Conditions imposed: [source:______, p.__]

[ ] Normal accounting procedures, specify:

[ ] Other, specify any details and reasons for conditions:

10. Date notice of funding hearing was issued: /____/____/____ /mm/dd/yy

11. Date of funding hearing: /____/____/____ /mm/dd/yy

12. Preparation time ________ days
(# of days between notice of funding hearing and date of funding hearing)

13. Any indication of overall cost of proceedings in which any intervenor funding granted: $____________

Sources of indication:
Cost Summary [source:______, p.__]

14. Number of intervenors denied funding in each hearing: [ ]

Reasons for denial: [source:______, p.__]

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15. Procedure for scrutunizing expenditure of Award [source:______, p.__]

Description of procedure used (summarize):____________________________

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______________________________________________________________
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______________________________________________________________
______________________________________________________________

16. Any appeal or review of Intervenor Funding Award:

[ ] Yes [source:______, p.__]

Nature and description of appeal: ______________________________

[ ] No

17. Other comments regarding file: [source:______, p.__]

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**NAME &**
**FILE NO.** ______________________________

18. **Applied:**
[ ] Yes
[ ] No

**Funded:**
[ ] Yes
[ ] No
[ ] Withdrawn

**Costs Awarded:**
[ ] Yes
[ ] No

19. Date application recieved: /___/___/___
/mm/dd/yy

20. Name of intervenor: ______________________________

Address: ______________________________
______________________________
______________________________
Postal Code

______________________________
Telephone Number

______________________________
Fax

If group of organization:

Primary contact person(s): ______________________________

Title: ______________________________

Function: ______________________________

Address:
(if different)
______________________________
______________________________
______________________________
Postal Code

______________________________
Telephone Number

______________________________
Fax

21. Type of intervenor: [source:______, p.__]

☐ Aboriginal group
☐ Community group
☐ Interest group
☐ Individual Intervenor
☐ Municipality
☐ Minority group
☐ Other, specify________________________________________

22. Brief description of organization (eg. history, structure) and interest in hearing: [source:______, p.__]

23. Counsel retained

☐ Yes Date retained: /____/____/____
/mm/dd/yy

________________________________________
Name of Counsel
________________________________________

________________________________________
Address
________________________________________
City Postal Code
________________________ ________________________
Telephone Number Fax

☐ No, why not [source:______, p.__]

________________________________________

________________________________________

24. Application (filed or otherwise indicated, specify -________________):

☐ Proceeded with

☐ Not proceeded with [source:______, p.__]

Reasons:________________________________

________________________________________

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________________________________________

________________________________________

25. Issues raised in application: [source:______, p.__]
(eg. issues and reasons, issues contested by anyone
- who and why?, distinction drawn between "public"
and "private" interests)

26. Issues for which intervening funding actually awarded: [source:______, p.__]
(summary of reasons, include reasons
for any rejected requests.)

[ ] N/A: ____________________

27. Divergence between issues funded and issues raised in main hearing & why: [source:______, p.__]

[ ] N/A: ____________________

28. Disbursement requested? [source:______, p.__]

Dispositions? Reasons?

29. Amount of intervenor funding requested: $____________ [source:______, p.__]

30. Amount of funding allotted to the intervenor: $____________ [source:______, p.__]

31. Amount of funding allotted as a percentage of amount of funding requested: ____________%

32. Reasons for divergence between funding requested and funding allotted: [source:______, p.__]

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33. Fund raising contributions: [source:______, p.__]

☐ Yes Amount $______________

Summary of fund raising activities for intervention:

______________________________________________________________

______________________________________________________________

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☐ No Why? ______________________________________________________

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34. Supplementary funding:

[ ] Did not Apply

[ ] Applied

Reasons: ______________________________

______________________________

______________________________

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______________________________

[ ] Granted

Amount and Why:

______________________________

______________________________

______________________________

______________________________

[ ] Denied

Reasons: ______________________________

______________________________

______________________________

______________________________

______________________________

35. Amount of supplementary funding allotted: $__________

36. Costs awarded:

[ ] Yes, 100% [source:______, p.__]

Why? (summarize): ______________________________

[ ] Yes, <100% [source:______, p.__]

Why? (summarize): ______________________________

(Question 36, Costs awarded, con't)

[ ] None [source:______, p.__]

Why? (summarize): ________________________________________

37. Expenditure approved without change:

[ ] yes [source:______, p.__]

Reasons: ________________________________________

(Question 37: Expenditure approved without change, con't)

[ ] No [source:______, p.__]

Summarize divergence: ________________________________________

[source:______, p.__]

Summarize reasons for divergence: ____________________________

(Question 17, Other comments, continued) [source:______, p.__]

# APPENDIX C
# ISSUES PAPER & LETTERS

UNIVERSITY OF
WINDSOR

October 31, 1991

Dear :

The Intervenor Funding Project Act, 1988 was established as a 3-year project to assist the participation of "public interest" intervenors in hearings before the Environmental Assessment Board, joint boards and the Ontario Energy Board. The Act recognizes the important contribution public interest intervenors can make to the complex decisions made by these Boards and requires that that contribution be largely financed by the proponents who are asking the Boards for approval, rather than by general public funds.

We are conducting a study, for the Ministries of the Attorney General, Energy and Environment, of the Act and its operation since coming into force in April 1989. An essential part of our research for this study involves consultation with those who have had experience with the Act and those who have an interest in it. We are writing to ask you to help us with this part of the study. The study will ultimately become a public document intended to assist government in its deliberations.

We are seeking submissions which reflect and document different perspectives on the Intervenor Funding Project Act and its implementing procedures. Some issues which have arisen to date include:

- how well has the Act met its objectives?
- are the procedures used for awarding funding fair?
- are the funding criteria appropriate?
- is adequate funding being awarded?
- how should supplementary funding be treated?
- are the allowable disbursements appropriate?
- what is the appropriate relationship between funding and costs at the end of a hearing?
- how can the process better reflect the needs of aboriginal or minority group intervenors?
- what changes are necessary, and why?

FACULTY OF LAW
401 SUNSET • WINDSOR ONTARIO • CANADA N9B 3P4 • 519/253-4232
FAX 519/973-7064 TELEX 064-77684

We have prepared a brief Issues Paper to assist you in formulating a response. However, this Paper should not constrain you in making what you consider to be other relevant comments on the Act and its implementation. We intend to refer to the submissions explicitly in our report, so they should be written with that in mind and be as well documented as possible.

The funding project in Part I of the Act will expire in April 1992 unless it is extended. This means that your response is important, but it also means, unfortunately, that time is very limited. We are required to submit our report on January 31, 1992 and would therefore like to have your submission by December 1, 1991.

We would like to draw your attention to two recent studies of the Intervenor Funding Project Act which you may find of interest: "Intervenor Funding and the Intervenor Funding Project Act in Ontario" by the Canadian Environmental Defence Fund; and "The Ontario Intervenor Funding Project Act, 1988: Its Review and Reform and a Model to Provide for Public Interest Participation in Regulatory Proceedings in Canada" by the Public Interest Advocacy Centre.

If you have any questions about the Issues Paper or the study generally, please do not hesitate to call us at (519) 253-4232, extension 2963.

We would like to hear from as many interested people as possible. If you know of anyone we may not have reached, please alert them to the study. Thank you for your cooperation.

Yours very truly,

Prof. W. A. Bogart          Prof. Marcia Valiante

UNIVERSITY OF
WINDSOR

October 31, 1991

Dear :

We are conducting a review of the Intervenor Funding Project Act for the Ontario Ministries of the Attorney General, Energy and Environment. A major part of our research for this study is consultation with individuals and groups with an interest in funding for public interest intervention in environmental and energy hearings.

A recent study of the Act done by the Canadian Environmental Defence Fund concluded that:

> The present process under the IFPA does not meet the funding needs of aboriginal intervenors. It is necessary to respect aboriginal interests and to allow aboriginal cultural and democratic processes to occur within the IFPA.

They went on to recommend the following:

> The Board should develop more flexible means of addressing funding claims by aboriginal groups. To that end, the Board should commission a study of the special requirements of native groups and develop specific methods for assessing aboriginal applications in a funding or environmental assessment hearing.

We are particularly interested in learning about the experience and views of aboriginal groups on the Act. We are writing to you in the hope that you will be able to assist us in doing so.

We are enclosing a copy of the general letter being sent out and a copy of the Issues Paper containing questions which may help you in responding.

We hope that you will be able to respond. Please call us if have any questions.

Yours very truly,

Prof. W.A. Bogart

Prof. Marcia Valiante

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# ISSUES
# RELATING TO INTERVENOR FUNDING AND THE ONTARIO INTERVENOR FUNDING PROJECT ACT

The following questions have been formulated on the basis that a wide variety of people from many different backgrounds and perspectives will be answering them. Please consider them in making your comments on intervenor funding and the Intervenor Funding Project Act. Please be as specific as possible in your responses, giving examples where possible.

The questions are divided into three parts. Part I focuses on general issues relating to intervenor funding and the Intervenor Funding Project Act. Part II asks some specific questions directed at those who have been or wanted to be "intervenors". Part III asks specific questions directed at those who have been "funding proponents", that is, those seeking Board approval who were required to bear the costs of intervenor funding.

**LET US EMPHASIZE:** these questions are intended only to facilitate your response. You are not limited in your response to the issues raised here and some of those listed may not be of immediate concern to you. All issues that you consider relevant should be addressed.

Ce document est aussi disponible en francais

## PART I - GENERAL ISSUES

1. (a) Have you been involved in an intervenor funding application in Ontario?

(b) If yes, how have you been involved? (for example, as a proponent, intervenor, counsel or agent to a party involved, as a Board member) If not, why not?

(c) Was the intervenor funding application under the Intervenor Funding Project Act or an Order in Council?

(d) Please specify:
- which hearing(s)
- which Board(s)
- the duration of the hearing(s)

2. (a) What do you consider the goals of intervenor funding to be?

(b) Do you support all of those goals?

(c) Does the Intervenor Funding Project Act fulfill those goals? How or how not?

3. Has the hearings process been affected by the IFP Act? How?

4. Has the quality of the decisions of the Ontario Energy Board, the Environmental Assessment Board and joint boards been affected by the IFP Act? How?

5. What do you consider to be the strengths or benefits of the IFP Act?

6. What do you consider to be the problems with or limitations of the IFP Act?

7. Does the IFP Act apply to all appropriate proceedings? If not, to which proceedings should it apply? Why?

8. (a) Are there particular interests of any groups that need to be taken into account in the IFP Act's procedures? If so, how can this best be achieved?

(b) How well are the special characteristics of aboriginal communities and culture addressed by existing procedures? What particular problems need to be addressed?

(c) Are minority groups disadvantaged by existing procedures? If so, how? How can this be overcome?

9. (a) What are your views on the eligibility criteria in s. 7(2) of the IFP Act?

(b) Are the criteria in s. 7(2) applied consistently to all intervenors in all cases? Should they be?

(c) Are there criteria which should be added or deleted?

(d) Should intervenors be required to contribute their own funds toward their hearing expenses?

10. (a) Please comment on the list of allowable disbursements in s. 7(3) of the IFP Act.

(b) Has the requirement that lawyers receive the Legal Aid tariff influenced intervenor representation? How?

11. How well do the procedures for obtaining funds and accounting for their disbursement work?

12. What safeguards in the IFP Act ensure that only legitimate interests and responsible intervenors will be funded? How well do these work in practice?

13. Please comment on the relationship between costs and intervenor funding. Is it appropriate for intervenors to repay awards that exceed a costs award? What is an appropriate approach?

14. Should municipalities be eligible for intervenor funding? In what circumstances (for example, should population be a consideration in eligibility)?

15. Is delay a concern with hearings where intervenor funding is available?

16. Please suggest (and justify) reforms to the intervenor funding process or the IFP Act.

## PART II - ISSUES TO BE CONSIDERED BY INTERVENORS, POTENTIAL INTERVENORS, THEIR COUNSEL OR AGENTS

1. (a) Had you ever participated in similar hearings prior to the availability of intervenor funding? Please identify hearings.

(b) How did your intervention differ in the two instances?

2. How did you receive notice of the possible availability of intervenor funding in your hearing? How long did you have before formal proceedings commenced?

3. (a) How did you receive notice of the funding hearing?

(b) Did you consider this notice and its timing adequate in your situation? If not, why not?

(c) How were you affected by the location of the funding hearing?

4. How well did you understand the issues involved in the hearing at the time you applied for funding?

5. Was the application procedure for funding understandable and easy to comply with? Did you experience language difficulties?

6. (a) How did the funding panel apply the criteria in s. 7(2) to your application?

(b) Were you required to make a contribution from your own funds?

(c) Were you encouraged or required to join a coalition in order to receive funding? Did you? Please comment on how that requirement affected your participation in the hearing.

7. (a) Did you receive funding? If not, on what grounds were you denied funding?

(b) Was that amount sufficient to enable you to participate fully? If not, what did you do?

(c) Was the time between the funding award and the start of the main hearing sufficient to enable you to prepare for the hearing?

8. (a) Did you receive funding for all relevant disbursements? If not, what disbursements should have been funded? How did the denial of funds for certain disbursements affect your participation in the hearing?

(b) Were you able to hire the lawyer and consultants of your choice with your funding award?

(c) Did the amount of the award accurately reflect your costs of intervention?

9. (a) Did you make an application for supplementary funding? At what point in the hearing?

(b) How did the supplementary funding procedure and requirements differ from those of the initial funding hearing?

10. Did you receive costs at the end of the hearing? If so, in what amount? Was part of the funding award held back until the end of the hearing? How did that affect your participation?

11. Do you feel that your participation influenced the ultimate decision?

12. Would you participate in a similar hearing again? Would you approach it differently now that you have had experience with the process? How? Would the availability of funding influence your decision to participate again?

## PART III - ISSUES TO BE CONSIDERED BY FUNDING PROPONENTS OR THEIR COUNSEL

1. Had you been a proponent in a similar hearing prior to the commencement of the intervenor funding project? Please comment on the differences. Was the length of the hearing affected by intervenor funding?

2. In the funding hearing you were involved in, did you challenge your designation as "funding proponent"? On what grounds? Were you successful? Why or why not?

3. How did you participate at the funding hearing? Did you

challenge funding applications? How were you treated when raising objections to funding applications?

4. What was the total amount you were required to fund? What proportion was this amount of your total hearing budget? Did you consider the awards reasonable in the circumstances?

5. Were you required to make supplementary funding awards? How far into the hearing? Did you consider the awards reasonable? Please comment on your experience with supplementary funding.

6. Did you feel there was any duplication of issues or evidence at your hearing? Could this have been avoided? How?

7. Was the ultimate decision in your hearing influenced by the intervenors?

8. How would "staged" funding (that is, providing funds prior to the funding hearing to enable detailed funding applications and hearing plans to be developed) affect you? When would this approach be appropriate?

9. How have you changed your approach to proposal development and hearings as a result of the existence of intervenor funding?

---

**REMEMBER**: You are not limited in your response to the issues raised here. **Please address all issues you consider relevant.**

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Please send all submissions, **no later than December 1**, to:

Prof. W.A. Bogart and Prof. M. Valiante
Faculty of Law
University of Windsor
Windsor, Ontario
N9B 3P4
Telephone: (519) 253-4232, extension 2963
Fax: (519) 973-7064

# APPENDIX D
# NEWSPAPERS ADVERTISED IN

# NEWSPAPERS ADVERTISED IN

1) English

The Sault Star, Sault Ste. Marie
The Ottawa Citizen
The Windsor Star
The Sudbury Star
The Times-News and The Chronicle-Journal, Thunder Bay
The Toronto Star
Kenora Miner & News
The London Free Press
Northern Daily News, Kirkland Lake
The Whig Standard, Kingston
The Sun Times, Owen Sound
The Law Times
The Lawyers Weekly

2) French

Journal Le Gout de vivre, Penetanquishene
Journal L'Express de Toronto
Journal Le Rempart, Tecumseh
Journal AGRICOM, Clarence Creek
Journal Le Carillon, Hawkesbury
Journal Le Voyageur, Sudbury
Le Nord, Kapuskasing
Le Nord de Kapuskasing

3) Aboriginal

Wawatay News
Native Beat

# APPENDIX E
# LIST OF SUBMISSIONS

# APPENDIX E

## Submissions and Related Documents

### I. Submissions

1. Atikokan Citizens for Nuclear Responsibility, n.d.
2. Robert Axford, Canadian Association of Single Industry Towns, December 11, 1991
3. Fabian Bandoni, City of Cambridge, Director of Engineering, December 20, 1991
4. C. Benson, Forests for Tomorrow, November 22, 1991
5. Rosalie Bertell, International Institute of Concern for Public Health, December 6, 1991
6. Mayor R.L. Bird, City of Burlington, November 13, 1991
7. Karl Braeker, Ontario Federation of Agriculture, November 20, 1991
8. Mayor Fergy Brown, City of York, November 20, 1991
9. Walter Brown, November 12, 1991
10. K.J. Bull, Director of Operations, City of Guelph, December 2, 1991
11. J.C. Butler, A.E. Sharp & Assoc., December 30, 1991
12. Heather Campbell, Ministry of Attorney General, December 20, 1991
13. Keith Campbell, n.d.
14. Martin Campbell, Beard, Winter, December 9, 1991
15. Joseph Castrilli, Morris/Rose/Ledgett, December 2, 1991
16. Lillian Clark, Consumers Fight Back, n.d.
17. Kelly Clune, Citizens Acting Now, n.d.
18. Colleen Cooney, Waste Not, December 8, 1991
19. Ed Cornies, Essex-Windsor Waste Management Committee, November 29, 1991

20. Fraser Craig, Manager of Environmental Health & Safety, Algoma Steel, January 10, 1992

21. George Davies, Deputy Minister of Energy, January 9, 1992

22. Deep River Area Ecoomic Development Department, n.d.

23. William Dennis, n.d.

24. A. Dickinson, Association of Major Power Consumers in Ontario, December 6, 1991

25. J.R. Dougall, Ministry of Transportation, Head Environmental Assessment Policy Section, December 11, 1991

26. D. Egar, Regional Director General Conservation and Protection, Environment Canada, Ontario Region, December 2, 1991

27. K.L. Edwards, Windsor Utlities Commission, November 12, 1991

28. H. Fletcher and J. Gardiner, MOLCA, December 18, 1991

29. P. Fontaine, Director, Economic Development Division, Municipality of Metro Toronto, January 2, 1992

30. Jim Foster, Township of St. Vincent (Town of Meaford), December 5, 1991

31. Clay French, Mayor, City of Orillia, January 24, 1992

32. W. Fruehauf Consulting Ltd., December 5, 1991

33. Bob Gibson, November 12, 1991

34. Robert Gooch, Gooch & Sons, January 16, 1992

35. Richard Groh, Chief Administrative Officer, Town of Innisfil, January 17, 1992

36. James Harvey; Gowling, Strathy, December 13, 1991

37. Robert Hawkes, Ontario Municipal Board, December 10, 1991

38. Andy Haydon, Regional Municipality of Ottawa-Carleton, Chairman, November 14, 1991

39. R. Horwood, February 5, 1992

40. Harvey Houle, n.d.

41. James Hurlburt, Lindemark Farms, n.d.

42. F. Warren Hurst, December 21, 1991

43. Joan Huzar, Consumers Association of Canada (CAC), December 16, 1991

44. Innovative Executive Services, n.d.

45. Jane Ireland, Ministry of Natural Resources, November 14, 1991

46. John Jackson, January 7, 1991

47. Marlo Johnson, Manager Hearings, Ontario Waste Management Corporation, January 29, 1992

48. Mayor T.S. Jones, Town of Dryden, November 25, 1991

49. Archibald Kimpe, November 27, 1991

50. Nancy Kleer, December 2, 1991

51. Nancy Kleer, Morris/Rose, December 17, 1991

52. R. Lindgren, Canadian Environmental Law Association, January 23, 1992

53. Rev. K. Logie, Stewardship Advocacy Coalition of Ontario Churches, November 26, 1991

54. L. Loman, Ear Falls Hunters and Anglers Club, November 25, 1991

55. J. Martel, Chair Planning Advisory Committee, EWWMC, January 17, 1992

56. R. Malowney, Director of Education and Secretary, The Northumberland Newcastle Board of Education, January 21, 1992

57. Roger Mawdsley, Vice President, Wakeynagun, Native Non Profit Homes Inc., January 23, 1992.

58. David McRobert, Starkman Poch, December 10, 1991

59. Ovide Mercredi, Assembly of First Nations, January 7, 1992

60. R. Modlich, Women Plan Toronto, January 13, 1992

61. Carol Montagnes, Ontario Native Council on Justice, Executive Director, November 18, 1991

62. Paul Muldoon, Pollution Probe, January 13, 1992

63. Mary Munro, Executive Vice Chair, EAB, attaching Intervenor Funding Project Act, 1988 Comments by the EAB, January 24, 1992

64. Basil Noels, Chief Administrative Officer, Lake Simcoe Region Conservation Authority, January 24, 1992

65. Ontario Energy Board, "Comments by the Ontario Energy Board on the Intervenor Funding Project Act, 1988", January 28, 1992

66. H.G. Payne, City Administrator, City of Windsor, January 15, 1992

67. Carol Pennycock, Davies, Ward & Beck, January 21, 1992

68. Paul Pinnington, President of Ontario Natural Gas Association, January 24, 1992 attaching ONGA, The Intervenor unding Project Act in Matters Before the OEB: Considerations for the Future (Post April 1992)

69. David Poch, Starkman, Poch, December 12, 1991

70. K. Posgate, Hydro Mississauga, November 22, 1991

71. Arvin Prasad, Town of Halton Hills, December 5, 1991

72. Professor Ronald Pushchak, n.d.

73. Stephen Salaff, November 15, 1991

74. Bruno Seppala, December 13, 1991

75. Judy Skidmore, NORTHCARE, Northcare Community Advocates for Resource Equity, November 20, 1991

76. Judy Skidmore, NORTHCARE, Northcare Community Advocates for Resource Equity, January 21, 1992

77. Eunice Skinner, Ontario Hydro, Acting Manager Public Hearing and Government Relations, January 20, 1992 with attachments

78. Neil Slack, Enviromax Systems, January 2, 1991

79. Mayor Wm. Smeath, City of Niagara Falls, November 21, 1991

80. Solcan Limited, December 9, 1991

81. Larry Solomon, Energy Probe, November 12, 1991

82. Janet Springer, Eco-Action, Meaford, January 13, 1992

83. Peter Staadecker, Nitrogen Products, November 18, 1991

84. Bruce Thom, City of Mississauga, November 29, 1991

85. R. Stephen Thompson, November 15, 1991

86. Doug Thomson, Canadian Bar Association, Environmental Law Section, November 22, 1991

87. Paul Vogel and Ian Goudy, Cohen Highley, December 3, 1991

88. James Wallace, City of Kitchener, Commissioner of Legal Services and City Solicitor, December 30, 1991

89. L.A. Ward, Price Waterhouse, January 16, 1992

90. Honourable C.J. Wildman, Ministry of Natural Resources, January 31, 1992

91. Fred Wilson, Ministry of Government Services, December 19, 1991

92. Dolf Wynia, Cdn Institute of Forestry, Norfolk Field Naturalists, Southern Ontario section, December 5, 1991

## II. Related Documents

1. Letter from P.Byer, Chair EAAC containing submissions to EAAC which refer to IF, November 28, 1991

    i. P. Byer, Regional Chairmen (sic) of Ontario
    ii. Lafontaine, Cowie, Buratto & Associates Ltd.
    iii. S. George Rich
    iv. Parks and Recreation Federation of Ontario
    v. Whitevale and District Residents Assoc.
    vi. M.M. Dillon Consulting Engineers
    vii. Ministry of Natural Resources
    viii. Gore & Storrie Limited
    ix. Canadian Petroleum Products Institute
    x. Haldimand-Norfolk Organization for a Pure Environment
    xi. Public Liaison Committee for the Stormount-Glengarry Waste Management Master Plan
    xii. Dow Chemical
    xiii. Greensville Against Serious Pollution
    xiv. Lyn Macmillan

2. Canadian Bar Association, Submission Regarding the Ontario Municipal Board to the Standing Committee on Government Agencies, September 1991.

3. Canadian Environmental Defence Fund, H. Campbell, Intervenor

Funding and the Intervenor Funding Project Act in Ontario, n.d.

4. Environmental Assessment Board, Recommendations of the EA Task Force; Towards Improving the Environmental Assessment Program in Ontario, March 25, 1991

5. The Environmental Assessment Board, The Hearing Process: Discussion Papers on Procedural and Legislative Change, September 1990

6. Lorraine Huinink, The Evaluation of the Funding Denials Under the Intervenor Funding Project Act, 1988, April 1991

7. John Kruger, Chair of the Ontario Municipal Board to Carmen Rogers, Counsel Policy Development Division, Ministry of the Attorney General, January 17, 1992 attaching Discussion Paper on the Applicability of Intervenor Funding to the Work of the Ontario Municipal Board, January 6, 1992

8. Paula Kulig, "Intervenor Funding Under Review" Law Times, November 25-December 1, 1991, 8.

9. Susan McWilliams, Ontario's Intervenor Funding Project Act, the Experience of the Ontario Energy Board, May 1991

10. Ontario Energy Board, Cost Assessment Guidelines, November 1991

11. Public Interest Advocacy Centre, R. Horwood, The Ontario Intervenor Funding Project Act, 1988: Its Review and Reform and a Model to Provide for Public Interest Participation in Regulatory Proceedings in Canada, n.d.

12. Report Regarding Environmental Cases to the Legal Aid Committee by the Group Application and Test Cases Subcommittee, September 5, 1991 attached to letter of Robert Holden, Provincial Director, Ontario Legal Aid, December 16, 1991

# APPENDIX F
# LIST OF INTERVIEWEES

# LIST OF INTERVIEWEES

- Linda Archval, Pauktuutit Inuit Women's Association
- Robert Axford, Canadian Association of Single Industry Towns, Red Lake
- Marie-Ann Bowden, Faculty of Law, University of Saskatchewan
- Linda Bohnen, Counsel Professional Relations Branch, Ministry of Health
- Michael Cochrane, Policy Development Division, Ontario Ministry of the Attorney General
- James Curren, Board Secretary, Environmental Assessment Board, Toronto
- Ella De Quehen, Northumberland Environmental Protection Group, Roseneath
- Cluas Degroot, Director of Finance and Capital Management, Ministry of the Environment
- Allen Drake, Director, Public Interest Advocacy Dept., State of New Jersey, Trenton, N.J.
- William T. Golden, Assistant Deputy General Counsel, U.S. Federal Trade Commission, Washington, D.C.
- Kenneth C. Hill, McChesney, Rogers, Hill & Callaghan, Newmarket
- Chief Randy Kapushasit, Chair, Moose River-James Bay Coalition
- Ghislaine Kerry, FEARO, Hull
- Lois Mambourgette, Editor, Wawatay News
- Prof. R.A. Macdonald, Faculty of Law, McGill University
- Helen McCallum, Department of Indian and Northern Affairs, Toronto
- Susan McWilliams, Ontario Energy Board, Toronto
- Reggie Modlich, Women Plan Toronto
- Ian Moncrieff, Consolidated Environmental Group, Chatham
- Arnie Peltz, Director, Public Interest Law Dept., Manitoba

Legal Aid Services Society, Winnipeg

- Peter Pickfield, Garrod and Associates, Guelph
- Terry Quiney, Provincial Coordinator, Fish and Wildlife, Ontario Federation of Anglers and Hunters
- Dr. Beth Savan, University of Toronto
- Judy Skidmore, Executive Vice-President, NORTHCARE
- Bill Taylor, Ontario Native Affairs Directorate, Toronto
- Brad Thompson, Coordinator Education and Policy Programs, Ontario Metis and Aboriginal Association
- Herman Turkstra, Turkstra Mazza Shinehoft Mihailovich, Hamilton
- Toby Vigod, Commissioner, New Planning for Ontario
- Pamela Wheaton, Senior Researcher, Environmental Assessment Advisory committee

# APPENDIX G

# EAB & OEB RECOMMENDATIONS

## LIST OF RECOMMENDATIONS

**Recommendation 1**

- **There should be a preamble to any new funding legislation stating that: The eligibility of a party to properly intervene in a proceeding under this Act shall be determined by its anticipated contribution to the process and not by its ability to access its own funds.** (10)

**Recommendation 2:**

- **The distinction in Section 7(1)(a) and (b) of the Act between issues of a public nature and those which are purely private should be deleted from any future funding legislation.** (11)

**Recommendation 3:**

- **Any new funding act should provide that intervenors may apply, in extraordinary circumstances, for partial funding to account for expenses incurred before the funding hearing.** (13)

**Recommendation 4:**

- **Any successor to the Act should state that funding is allowed only for those issues which the main panel has determined are to form the subject matter of the hearing for which funding is sought.** (13)

**Recommendation 5:**

- **The definition of proponent should be expanded to permit the Board to name utilities as proponents in the event that the Board calls a generic hearing on its own motion.** (15)

Recommendation 6:

- Section 5 of the Act be amended to allow the Chair to appoint as many members as deemed necessary to hear individual funding applications. (15)

Recommendation 7:

- Any successor to the Act should provide that funding should include those disbursements found by the panel to be reasonable and necessary for the applicant's intervention. (16)

Recommendation 8:

- The Board recommends that any new funding legislation not include any restriction similar in nature to the financial resources standard contained in Section 7(2)(c) of the Act. (20)

Recommendation 9:

- The requirement for the examination of the fundraising efforts of an intervenor seeking funding (Section 7(2)(d)) should be deleted from any future funding legislation. (20)

Recommendation 10:

- Any new funding legislation should contain a provision whereby the Board is empowered to approve an application without a hearing. (21)

Recommendation 11:

- Any new funding legislation should contain a provision whereby, at the discretion of the Chair, any hearing required to decide a funding application may be by a panel other than the panel hearing the main case. (22)

Recommendation 12:

- Any new legislation should contain a section whereby:

  1) the possibility of a negative cost award is recognized and provision made for an intervenor subject to such an award, to have a special hearing with the existing right of appeal; and

  2) a holdback of 20 to 30 percent can be made to every funding award. (25)

Recommendation 13:

- A new funding act should not contain a restriction on a lawyer's fees as set out in Section 7(3)(a) of the Act. (26)

Recommendation 14:

- The Board should be empowered at all times to order re-allocations of amounts within the overall totals awarded and to order substitutions for persons named within the order for others. (27)

Recommendation 15:

- Appeals of funding decisions should not cause a stay in the proceedings because of the danger of retroactive rate making. (27)

Recommendation 16:

- Any new funding legislation should clarify that supplementary funding is designed to cover costs which were not reasonably foreseen at the time of the original application for funding. (28)

## 5. List of Recommendations

### Recommendation 1

That the amended *Intervenor Funding Act* should provide for the establishment of an independent intervenor funding agency to decide on both initial and supplementary intervenor funding applications and to administer all intervenor funding programs.

**[This principal recommendation reflects the Board's priority. If it is implemented, some of the other recommendations set out below may be unnecessary or may require appropriate modification.]**

### Recommendation 2

That the amended *Intervenor Funding Act* include measures to either limit the funds available to public proponents for the preparation of their cases or make it known that there will be some proportionality in funds awarded to intervenors relative to the funds available to public proponents.

### Recommendation 3

(a) That the amended *Intervenor Funding Act* should include provisions for intervenor funding at the earliest feasible stage in the approvals process. The purpose of this initial or first stage funding program should be to provide the necessary financial assistance for eligible intervenors to identify the issues of concern to negotiate with parties of similar interests with a view to forming coalitions and/or co-ordinating their case preparation and presentation and to prepare a plan for the preparation and presentation of their cases.

(b) That the amended *Intervenor Funding Act* should include clear provisions to allow the hearing Board to determine the relevant issues in a proceeding after the initial funding program, described in 2(a) above, has been completed and before the commencement of a second stage funding program related to the costs of case preparation and presentation.

**Recommendation 4**

(a) That the amended *Intervenor Funding Act* provide that the hearing Board may make preliminary determinations of the issues to be addressed at the hearing and the hearing format, and

(b) That the amended *Intervenor Funding Act* provide that the hearing Board may make rulings on jurisdictional, relevance and procedural issues that arise during the intervenor funding process and are referred to it by the funding decision-maker or by motions from the proponent or the intervenors.

**Recommendation 5**

(a) That the amended *Intervenor Funding Act* clearly indicate that the *Statutory Powers Procedure Act* does not apply and that a hearing is not mandatory for every intervenor funding decision or for decisions regarding applications for supplementary funding.

(b) That the amended *Intervenor Funding Act* explicitly provide that an appeal of the decision of a funding panel is available to the Ontario High Court on a question of law and not to the Minister or to the Cabinet.

**Recommendation 6**

That the amended *Intervenor Funding Act* include provisions to allow the funding decision-maker to award intervenor funding for the disbursements of legal counsel, consultants, expert witnesses, case administrators and the intervenor as necessary for the representation of the interest.

**Recommendation 7**

That the amended *Intervenor Funding Project Act* provide that if the funding decision-maker is to be a panel of the Board, a funding panel may consist of up to three persons named by the Chair of the Board from among its members.

**Recommendation 8**

That the amended *Intervenor Funding Act* should clearly establish an administrative regime for intervenor funding programs, whether the funding decision-maker is an independent agency, the hearing Board or the combination of funding panel and hearing Board (as the IFPA prescribes at the present time).

k\funding\general\recommen.ifa